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NOTES OF INDIAN CASES.

A. B. MITCHELL, *Re v.* J. C. DUTT, (1927) I.L.R. 55 Cal. 173.

A somewhat similar case came up before the Court of Common Pleas in England in 1876 where the Town Clerk of a borough mistakenly notified that the nomination papers for a Municipal election could be given till a certain date while the time prescribed by the Act expired on the previous day and the Court held that under the circumstances the election of a candidate who gave his nomination papers on later day was void. The only difference between the case under notice and the case in the Common Pleas Division is that in the present case the Chief Executive Officer of the Corporation of Calcutta notified that the deposit consequent on the submission of the nomination papers could be made on a day subsequent to the period prescribed by the Calcutta Municipal Act of 1923. The learned Judges in the present case have come to the same conclusion, *i.e.,* that the election of the candidate who paid the deposit amount on the later date was void. The decision in each case is no doubt one largely resting on the provisions of the particular statute.

The further question whether, in such a case, the candidate who secures the next highest number of votes can be declared to be duly elected has been disposed of by the learned Judges with the observation that there is nothing in the Act, so entitling the second candidate at the polls. It is, therefore, worthy of consideration what the law on the matter is in the absence of any specific provision in the enactment. As early as 1808,

it was laid down by Lord Ellenborough, C. J., in *The King* v. *Hawkins,*[1] that when a disqualified candidate secures the largest number of votes in an election the votes of those voters only who had notice of the disqualification and still voted for him should be deemed to have thrown away their votes and not have partaken in the election. So that if by rejecting those votes alone, the qualified candidate who gets the next largest number of votes gets to the top of the polls he may be declared duly elected. A similar view was expressed by Abbott, C. J., in *Claridge* v. *Evelyn.*[2] Where, however, the disqualification is not known to the electors and the disqualified candidate secures the largest number of votes, it has been held that the proper course is merely to set aside the election and order a fresh election. *Hobbs* v. *Morey.*[3] There was a doubt at one time whether for rejecting the votes it was necessary that the electors need only have knowledge of the facts that create the disqualification or should also know that they amounted to a disqualification. *The Queen* v. *Mayor of Tewkesbury.*[4] Since then, however, it has been held that a knowledge on the part of the electors of the disqualifying facts alone suffices for the purpose of throwing away the votes given. *Beresford Hope* v. *Lady Sandhurst.*[5] Even a doubt about the disqualification will not prevent the votes from being thrown away and the candidate next on the poll being declared elected. *Leominister's case.*[6] The effect of these decisions has been adopted in this country in *Gopala Aiyangar* v. *Ebrahim Rowther*[7] by a Full Bench of the Madras High Court. It may also be added that a disqualification need not necessarily be a personal disqualification but may be referrable to an invalid nomination. This is clear from *Howes* v. *Turner*[8].

Banka Behari Deb *v.* Birendra Nath Dutt, (1927) I.L.R. 55 Cal. 219.

The learned Judges having come to the conclusion that the order of remand by the lower appellate Court in the case was not one passed under Order 41, Rule 23 of the Civil Procedure Code, it is clear that there is no right of appeal

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1. (1808) 10 East 211: 103 E.R. 755. 2. (1821) 5 B. & Ald 81 · 106 E R. 1123.
3. (1904) 1 K.B. 74. 4. (1868) L R. 3 Q B. 629. 5. (1889) 23 Q.B.D. 79.
6. Rogers on Elections, 19th Edition, Vol. II, p. 619.
7. (1925) I.L.R. 48 M. 509: 49 M.L.J. 606 (F.B.).
8. (1876) 1 C.P.D. 670,

from the order. It may be that there is something to be said against the view that has been given expression to in some of the cases, that an order of remand should be presumed to have been passed under Order 41, Rule 23, though it does not purport to have been so passed and an appeal should be entertained therefrom on that footing. In such a case, the appellate court having the power to remand a case both under Order 41, Rule 23 of the Civil Procedure Code and under its inherent jurisdiction, there may be no more reason to relate the order to any one of such powers and it may be a question to be decided in each case, under which category the particular order falls before coming to a conclusion whether it is appealable or not.

Where, on the other hand, the appellate court purports to remand the case under Order 41, Rule 23 of the Civil Procedure Code, it is too much to expect the litigant to decide for himself whether the order is one rightly falling under that rule or not, in coming to a conclusion on its appealability. We venture to think that the observations of one of the learned Judges in the case under notice to that effect, must be taken to be *obiter* and there seems to be no warrant for the view that where a decision purports to be given under a section under which if it is rightly given, the decision would be appealable, there would be no appeal if the decision is not rightly given under the section. The question has arisen under various enactments and it has been generally answered that where an order purports to be given under a section, it is none the less appealable as an order properly passed under that section. The principle is supposed to have been laid down by the Privy Council in *Hurish Chunder Chowdhry* v. *Kalisunderi Debi*[1] where the learned Chief Justice of the Calcutta High Court held that there was no appeal from an order which he considered was purely ministerial though the order purported to be a judicial order passed by the Judge in the exercise of his judicial discretion. The Privy Council overruled this view and held that in such a case there would be a right of appeal treating it as a judicial order which it purported to be. This view of the Privy Council was followed by the Calcutta High Court in *In the Goods of Indra Chandra Singh*[2] where the learned Judges observed that if an order is made without jurisdiction, an appeal

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1. (1883) I.L.R. 9 C. 482: 10 I.A. 4 at 27 (P.C.).
2. (1896) I.L.R. 23 C. 580 at 590.

would none the less lie from it. The same view was taken by another Bench of the same Court in *Moharaj Kumar Bindeswari* v. *Thakur Lakpat Nath Singh,*[3] after a reference to the prior decisions. The question has been considered by the Madras High Court in *Abdul Rahim Sahib* v. *Ganapathi Batta,*[4] *Latchmanan Chetty* v. *Ramanathan Chetty*[5] and *Muthiah Chettiar* v. *Govinddoss Krishnadoss*[6] and the learned Judges have held that where an order is purported to be made under a particular section, it is appealable as such, even though it was not properly made under the section. *Prasanna* v. *Baidya Nath*[7] and *Gopal Singh* v. *Mangal Singh*[8] are some of the decisions where the question of the appealability of a remand order purported to be made under Order 41, Rule 23 of the Civil Procedure Code came up before the High Courts and was decided in the affirmative. There seems therefore to be no reason on principle or authority to doubt the correctness of these decisions and the learned Judge in the case under notice has not referred anything to the contrary.

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3. (1910) 15 C.W.N. 725.
4. (1900) I.L.R. 23 M. 517: 10 M.L.J. 305.
5. (1904) I.L.R. 28 M. 127: 14 M.L.J. 436.
6. (1921) I.L.R. 44 M. 919 : 41 M.L.J. 316.
7. (1920) 31 C.L.J. 360.
8. (1927) 107 I.C. 284.

MUTHIAH CHETTY *v.* PALANIAPPA CHETTY, I.L.R. 51 Mad. 349: 55 M.L.J. 122 (P.C.).

This is an appeal from the judgment of the High Court of Madras in *Muthiah Chetty* v. *Palaniappa Chetty*.[1] The learned Judges of the High Court held that though there is no attachment, if both the decree-holder and the claimant proceed upon the footing that there was one and an adverse order is passed against the claimant he is bound to come within the one year provided by Article 11 of the Limitation Act. Their Lordships came to that conclusion on some ground of estoppel. Their Lordships of the Privy Council dissent from this conclusion and hold that if there is no attachment in execution, there can be no claim and no order thereupon to which conclusiveness would be attached by Order 21, Rule 63 if a suit is not brought to set it aside within the one year provided by Article 11 of the Limitation Act. Their Lordships cannot be taken to hold that the party could not be estopped from contending that there was no attachment but only that the circumstances did not warrant the raising of such an estoppel. There cannot be an estoppel against the statute but on the question of fact, attachment or no attachment there might be estoppel or *res judicata* which is only a species of estoppel. In the case under review, there was no question of *res judicata*, and beyond an error as to facts on both sides, there was no foundation for an estoppel as to the fact of attachment.

Their Lordships make it clear that the order directing attachment is quite distinct from attachment itself and in the absence of attachment as directed by the Civil Procedure Code none of the consequences attaching to a valid attachment can follow—one of which is the application of Article 11 to orders on claim petitions.

SUBRAHMANYA AIYAR *v.* SABAPATHY AIYAR, I.L.R. 51 Mad. 361: 54 M.L.J. 726 (F.B.).

This decision sets at rest the conflict of rulings as regards the effect of a *bona fide* partition as between a father and his sons on the creditors' right of recourse against the share allotted to the son. If the dictum in *Sahuram Chandra* v. *Bhup Singh's*[2] case that there is no liability in the son to pay the debts of the father during the latter's lifetime except in so far as the

1. (1921) I.L.R. 45 Mad. 90: 41 M.L.J. 594.
2. (1917) I.L.R. 39 All. 437: 33 M.L.J. 14 (P.C.).

former could be reached through the power of the father to sell for his antecedent debts, it could with force be urged that during father's lifetime once there is partition, the sons could no longer be proceeded against. Seeing that that view has been abandoned, it seems difficult on principle to justify the conclusion that the sons are exempted from liability in respect of the properties in their possession after partition. All the Judges seem to be agreed that if the partition is so arranged that the father's share is insufficient to meet the debts, the partition would be regarded as *mala fide* and may be questioned by the creditor. It is difficult to see how this view is reconcilable with the position that the liability of the son is only in respect of the joint family property during the continuance of the joint status. What fraud is there in not providing for the payment of debts in respect of which he is no longer liable? The very reservation in respect of *mala fide* partitions would seem to involve necessarily the conclusion that in respect of the father's debts there is a liability in the sons to the extent of the joint family property in their hands and failing to provide for them is fraud.

Undoubtedly the nature of the liability of the son is peculiar. He cannot be sued apart from the father so long as the father is alive (*Periaswami Mudaliar* v. *Seetharama Chettiar*[1]) and his liability is only to the extent of the property in his hands. On the death of the father the sons divide the liability according to their shares. The detailed provisions as to when a person is liable for the debts of the father came to be enacted as pointed out by Mr. Justice Subramania Aiyar in *Ramasami Nadan* v. *Ulaganadha Goundan*[2] by reason of the absence of any process available against property directly and apart from the person of the debtor. Even after the death of the father, if the son is a minor, he is not to be liable. अप्राप्तव्यवहारश्चेत् स्वतन्त्रोऽपि नर्णभाक्. The same sort of provision is laid down as regards payment of debts incurred for family necessity. The conclusion need not be regretted for the principle of right by birth is reconcilable with justice only if a certain amount of latitude is allowed to the creditor of the father to proceed against the family property, seeing especially that the rule as to right by birth is applicable under the Hindu Law equally to self-acquired property of the father.

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1. (1903) I.L.R. 27 Mad 243: 14 M.L.J. 84.
2. (1898) I.L.R. 22 Mad. 49: 8 M.L.J. 312 (F.B.).

In the matter of BALUSAMI, I.L.R. 51 Mad. 417: 55 M.L.J. 175 (F.B.).

GOPALA KRISHNAYYA *v.* GOPALAN, I.L.R. 51 Mad. 342: 54 M. L. J. 674.

In the former case, the Full Bench held that on severance of status between the father and sons by a suit for partition, the power of the Official Assignee to sell the son's share for the father's debts is at an end. It is an intelligible proposition that the power once vested in the Official Assignee is not affected by any subsequent event just as it is not affected by the death of the father (*Balavenkata Seetharama Chettiar* v. *Official Receiver, Tanjore*[1]), but the distiction made by the Officiating Chief Justice between complete partition and incomplete partition does not seem to be justifiable in principle. The power of the father is derivable from the joint status and once that joint status is severed, any further power in the father seems to be indefensible on principle. On the whole, we think the conclusion arrived at by the majority is sound, *viz.*, that the Official Assignee would have the power of the father with all its inherent defects. In the second of the cases, the same principle has been applied to property attached by a creditor of the son. In *Subraya* v. *Nagappa*[2] the Bombay High Court took the view that once the son's share is attached, the father's power of disposal of the same is at an end. If the Official Assignee's power is of the same quality and subject to the same limitations as that of the father, then the same consequence should follow on attachment of the son's share though in the meanwhile the father's power is vested in the Official Assignee. There is no conflict between the ruling in these cases and *Subramania Aiyar* v. *Sabapathi Aiyar.*[3] Under the latter ruling, no doubt the liability of the son continues even after partition but it does not follow that the same methods are available to the creditor both before partition and after partition. The difference is very familiar to lawyers. A decree against the father, though executable against the sons during his life-time, was not before the present Code of Civil Procedure executable as against the sons and the creditor's only remedy was a suit on the basis of the decree (*Periasami Mudaliar* v. *Seetharama Chettiar*[4]). Partition had

1. (1926) I.L.R. 49 Mad. 849: 51 M.L.J. 269 (F.B.).
2. (1908) I.L.R. 33 Bom. 264.
3. (1927) I. L.R. 51 Mad. 361: 54 M.L.J. 726 (F.B.).
4. (1903) I.L.R. 27 Mad. 243: 14 M.L.J. 84.

a similar effect and there is, no doubt, that the remedy of a suit on the decree was equally available in such a case. Though the general principle laid down in the second case is sound, the application seems to be of doubtful correctness; attachment prohibits only private sales by the judgment-debtor and cannot affect the dominant rights of other persons or even of the judgment-debtor in performance of a prior or overriding duty.

SANKUNNI MANNADIAR *v.* KRISHNA MANNADIAR, I.L.R. 51 M. 320 : 54 M.L.J. 682.

In a previous suit, a curious decree was passed removing a karnavan and appointing "the 1st and 3rd plaintiffs to the management" as prayed for by the plaintiffs of whom the 2nd plaintiff was the next senior anandravan to the 1st plaintiff. In this case the Court had to appraise the effect of such appointment on the rights of the 2nd plaintiff when the 1st died. Their Lordships, we think rightly, held that the decree did not affect the rights of the 2nd plaintiff when he became entitled to karnavanship. Neither family karars nor decrees can be presumed to make provision for a scheme of management indefinitely. On the other hand, there is authority for holding that Courts have no power to frame schemes at all (though the case in *Nemamma Kudre* v. *Achmu Hengsu*[1] sounds a dissentient note) and that in the case of karars restrictions on karnavan's rights of management must be presumed to apply only to the karnavan in question and if any of his successors are intended to be bound the person intended to be bound must be a consenting party thereto and it must also clearly appear that it was intended to have that effect. *Prima facie* the only question that would be discussed in a suit for removal of a karnavan is whether he ought to be removed or not. Questions as to the fitness of the immediate successor might arise on the ruling in *Nemamma Kudre* v. *Achmu Hengsu*[1] but when the successor is not removed but allowed to continue, no further question could normally arise and the rights of management of the next in seniority whose rights are only a sort of *spes successionis* dependent on his survival cannot, in the absence of the clearest language, be held to be adjudicated upon.

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1. (1919) I.L.R. 43 Mad. 319: 37 M.L.J. 539.

JAYAPPA LOKAPPA *v.* SHIVANGOUDA DYAMANGOUDA, I.L.R. 52 Bom. 72.

In the view that the learned Judges have taken of the construction of the security bond in the case, *i.e.*, that the surety has not rendered himself or his properties liable for the default of the particular judgment-debtor, the further question whether a security bond given to the court charging or mortgaging the immoveable properties of the surety requires registration or not, did not arise for decision. But the learned Judges have discussed the question and come to the conclusion that a security bond charging immoveable properties given as a condition for obtaining an order for stay of execution by the appellate court does not require registration under the Registration Act. In coming to this conclusion they have differed from *Nagarum Sambayya* v. *Tangatur Subbayya*[1] where such a document was held to require registration. It must be said that the Judges who decided the latter case clearly kept in view the considerations and decisions of the Privy Council referred by the learned Judges in the present case, but came to the contrary conclusion. The two leading decisions of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu*[2] and *Prantal Anni* v. *Lakshmi Anni*[3] were referred to by the Madras Judges and held to have no bearing on the question. The later case in *Hemanta Kumari Debi* v. *Midnapur Zamindari Company*[4] does not really add anything to what has been decided by the Privy Council in the earlier cases. We, therefore, venture to think that there is no justification for the remark that the learned Judges in *Nagarum Sambayya* v. *Tangatur Subbayya*[1] had not the Privy Council decisions cited to them or did not consider them. One point made by the learned Chief Justice in the present case must, however, be noticed; his Lordship points out that such a document may not amount to a mortgage if it is given to the court, as a mortgage must be to a particular "person" and the court is not a legal person as shown by the Privy Council in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*.[5] None the less, there is the creation of a right in immoveable property and the question will still remain whether the security bond comes under any of the exempting clauses of S. 17 of the Indian Registration Act.

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1 (1908) I.L.R. 31 M. 330. 2. (1897) I.L.R. 20 All. 171 (P.C.).
3. (1899) 26 I.A. 101: I.L.R. 22 M. 508: 9 M.L.J. 147 (P.C.).
4. (1919) 46 I.A. 240: 37 M.L.J. 525 (P.C.).
5. (1919) I.L.R. 42 A. 158: 38 M.L.J. 302 (P.C.).

VENKATARAMA AIYAR *v.* OFFICIAL RECEIVER, TINNEVELLY, I.L.R. 51 Mad. 344 : 54 M.L.J. 585.

If after presentation of the petition in insolvency and before adjudication, the debtor should die, what is to happen—was the question that arose in this case. There would have been no difficulty on the section as it stood in Act III of 1907. "The proceedings shall be continued as if he were alive", was the language in the old Act and that is the language of the Presidency Towns Insolvency Act, and that is the language of the English Bankruptcy Act. The legislature would not let well alone but would improve the language and the present Act says instead: "shall be continued so far as may be necessary for the realisation and distribution of the property of the debtor". Naturally the question arises what about setting aside fraudulent alienations and distribution *pro rata*, etc., which is the consequence only of adjudication and cannot result without an adjudication for which, without straining, there is no provision in the new language. But strain, their Lordships did and we think rightly. The petition in this case was by the debtor and the ruling has since been applied to the creditor's petition by Ramesam and Devadoss, JJ.

BALLA MAL *v.* ATA ULLAH KHAN, L.R. 54 I.A. 372: I.L.R. 9 Lah. 203: 53 M.L.J. 166 (P.C.).

Deeds of *wakf* by Mahomedans which contain provisions for the settlor and his descendants and other members of his family have always been scrutinised by the Privy Council with some amount of suspicion as regards their *bona fide* character and unless there is a substantial and real dedication of the properties to charity, such wakfnamas have been held to be illegal, when it appears that the real object was to make a family settlement under the cloak of a *wakf*, even if it should appear that there is a gift to charity of a substantial amount. The wakfnama which was the subject-matter of dispute in the present decision was one of the usual type which their Lordships have declined to uphold on the principle stated above. No doubt if the wakfnama in question had been executed after the Act VI of 1913, it would have been valid but the Wakf Validating Act not being retrospective could not apply. It is interesting to note that attempts are being made to introduce private legislation to make the Wakf Validating Act retrospective.

RAJ MAL *v.* HARNAM SINGH, I.L.R. 9 Lah. 260.

The language of the enacting section being clear and unambiguous, its effect cannot be cut down by the terms of the preamble of the Act. It is only if there is ambiguity in the enacting part that it is permissible to have recourse to the preamble to explain and elucidate the meaning of the legislature. This decision reviews the cases on the point which deal with the question as to how far it is legitimate to refer to the preamble of an Act in construing the sections thereof. As observed by the Judicial Committee in *The Secretary of State for India* v. *Maharajah of Bobbili*,[1] where the section of the Act makes operative provisions in excess of the apparent ambit of the preamble "it is the section that must govern."

In the Matter of H. DALY AND OTHERS, I.L.R. 9 Lah. 269.

This is an interesting judgment as regards the power of the High Court to expunge passages from judgments delivered by itself or by Subordinate Courts. The jurisdiction may be exercised by virtue of its powers of superintendence under the Government of India Act, under section 151, Civil Procedure Code and section 561-A of the Criminal Procedure Code. Although in one case the Madras High Court doubted if it had jurisdiction to expunge remarks in a judgment against persons not parties to the proceedings, see *In re Krishnaswami Iyengar*,[2] there are a number of decisions of the High Courts which hold that the power exists and may be exercised in proper cases.

DELHI CLOTH AND GENERAL MILLS CO., LTD. *v.* INCOME-TAX COMMISSIONER, DELHI, L.R. 54 I.A. 421: I.L.R. 9 Lah. 284: 53 M.L.J. 819 (P.C.).

Section 66-A of the Income-tax Act of 1922 provides for a statutory right of appeal to the Privy Council against orders passed by the High Court on references made to it under S. 66. Prior to the enactment of this new section by the Income-tax Amendment Act of 1926, there was no appeal as of right to the Privy Council. See *Tata Iron and Steel Co.* v. *Chief Revenue Authority, Bombay*[3]. The Privy Council have held in the pre-

1. (1919) L.R. 46 I.A. 302: I.L.R. 43 Mad 529: 37 M.L.J. 724 (P.C.).
2. (1917) 35 M.L.J. 368.
3 (1923) L.R. 50 I.A. 112 : I.L.R. 47 B. 124 : 45 M.L.J. 295 (P.C.).

sent decision that the right of appeal granted by section 66, clause (2) is confined to cases described in sub-section (2), *i.e.*, only to cases which the High Court certifies to be a fit one for appeal to His Majesty in Council and that the reference to the provisions of sections 109 and 110, Civil Procedure Code in sub-section (3) does not enlarge the class of cases where an appeal will lie as of right, because of the limited referential words in the sub-section, *viz.*, "so far as may be". The words "fit one for appeal to His Majesty in Council" are taken from section 109, clause (*c*), Civil Procedure Code and should be construed in the same sense as in the Civil Procedure Code.

It is also worthy of note that in the particular case, their Lordships while reiterating the principle of the well-known decision of *Colonial Sugar Refining Co.* v. *Irving*[1] apply it to the converse case. "Provisions in a statute which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of an express enactment or necessary intendment." Hence orders which were final at the date of the new statute and not liable to be appealed against cannot be affected by the new right of appeal conferred by the statute for the first time.

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1. (1905) A.C. 369.

JAI NARAIN SINGH *v.* MUNNA LAL, I.L.R. 50 All. 489.

The learned Judges in this case dissent from the decision of the Madras High Court in *Appalasuri* v. *Kannamma Nayuralu*,[1] but if the reasoning in this case is right, *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapathi Alakajeswari*[2] ought to have been decided the other way about. In that case, the elder widow mortgaged the land for necessity but their Lordships say that it was not competent for her to do so. The widows may be co-parceners in the English sense of the term but to call them co-parceners in the Hindu law sense seems to be unjustifiable and it would seem equally so to apply to them the rule applicable to co-parceners in the Hindu law sense of the term. In *Kalyanasundaram Pillai* v. *Subba Mooppanar*[3] it was ruled relying upon *Jijoyiambi Bayi Saiba* v. *Kamakshi Bayi Saiba*[4] that the senior widow was entitled to the care and management of the property and as such entitled to bind the junior by alienating for necessity. The distinction suggested in *Appalasuri* v. *Kannamma Nayuralu*[1] that in *Kalyanasundaram Pillai* v. *Subba Mooppanar*[3] the senior widow was acting as manager with consent does not seem to be justified as just at the relevant time, there seems to have been an estrangement and the alienation is supported only by reference to *Jijoyiambi Bayi Saiba* v. *Kamakshi Bayi Saiba.*[4] No doubt in *Vadali Mamidigadu* v. *Kottapalli Ramayya*[5] the same learned Judges that decided *Kalyanasundaram Pillai* v. *Subba Mooppanar*[3] hold that unless one widow is managing for both she cannot bind the other even for necessity. It seems to be fairly agreed that if one of them is constituted a manager for the other or if the assent of the other is taken to the alienation, the alienation would be good. Could not such assent be given in advance in a partition deed between the two and further could not such assent be inferred when there is a partition? It is possible to hold on the analogy of the case of joint trustees that every individual act of alienation should have the intelligent assent of each of the widows, but granting there is necessity, and the person acting is also a widow, and management by one is in accordance with the genius of Hindu law, why should not such assent suffice? *Thakurmani Singh* v. *Dai Rani Koeri*,[6] which is relied upon in the case under review does not seem to

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1. (1925) 49 M.L.J. 479. 2. (1892) I.L.R. 16 M 1 · 19 I.A. 184 (P C).
3. (1902) 14 M.L.J. 139. 4. (1868) 3 M.H.C.R. 424
5. (1902) I.L.R. 26 M. 334. 6. (1906) I.L.R. 33 C. 1079.

touch the question. The case seems to proceed entirely on the peculiar circumstances of the case, *viz.*, that one widow had surrendered her share of the estate to the reversioners and having thus consented to a division of title the reversioners were estopped from denying the title of the other widow to deal with her share for necessity—an unsatisfactory ground the more so after the later pronouncements of their Lordships of the Privy Council against partial surrenders. There is much to be said from the point of view of convenience in favour of the view taken in this case.

SURENDRA KUMAR ROY CHOWDHURY *v.* SUSHIL KUMAR ROY CHOWDHURY, I.L.R. 55 Cal. 249.

The question that arose in this case, as to the jurisdiction of a court to appoint a receiver or order a temporary injunction pending arbitration proceedings, does not seem to have been considered by any of the High Courts in India in any of the reported cases, though there are two decisions in the Judicial Commissioner's Court of Sind in *E. D. Sassoon & Co.* v. *Mangalchand*[1] and *Chetansing Bagasing* v. *Gulibai*[2] bearing on the question. The latter deals with the same point as the one in the case under notice and it was held that a court has power to appoint a receiver though the subject-matter of the suit has been referred to arbitration pending suit and the arbitration proceedings are pending, a conclusion which is the same as that reached by the learned Judges in this case. As pointed out by the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*[3] in such a case all proceedings from the first to last are under the supervision of the court and it may therefore be suggested that the court retains jurisdiction to appoint a receiver pending arbitration. The real objection that has been raised to the power of the court to appoint a receiver pending a reference through court has been rested on sub-clause (2) of clause (3) of the second schedule to the Civil Procedure Code by which if a matter is referred to arbitration, the court is not to deal with the matter in the suit. We take it that the answer to the objection is that in the first place that the right to ancillary reliefs pending suit do not form the subject-matter of the suit and are not ordinarily the subject of reference. Another answer seems to

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1. (1909) 4 I.C. 609. 2. (1923) 78 I.C. 84.
3 (1901) I.L.R. 29 C. 167 at 182. 29 I.A. 51 at 57: 12 M.L.J. 77 (P.C).

be by way of analogy to the 18th rule of the second schedule to the Civil Procedure Code and section 19 of the Arbitration Act. In cases falling under the corresponding provision of the English Arbitration Act, it has been held in England that though an action is stayed by reason of an agreement by parties to refer the matter to arbitration outside court prior to action, the court can none the less order a temporary injunction or appoint a receiver of the properties pending the arbitration proceedings, at the time of granting the stay or even afterwards. *Zalinoff* v. *Hammond.*[4] The prior cases have been reviewed by Mr. Justice Kay in *Compagnie de Senegal* v. *Woods.*[5] *See* also *Cumberland Union Banking Company* v. *Maryport Hematite Iron and Steel Company.*[6] If, therefore, a stay of suit under rule 18 of the second schedule to the Civil Procedure Code and section 19 of the Arbitration Act does not affect the jurisdiction of the court to order an injunction or to appoint a receiver, there seems to be no reason why a reference through court under rule 1 should have a greater effect and prevent the court from granting the ancillary reliefs. There can thus be objection to giving the provisions of rule 3 the same operation as to a stay of suit under rule 18 of the same schedule.

BASAPPA BUDAPPA *v.* BHIMANGOWDA SHIDDANGOWDA, I.L.R. 52 Bom. 208.

It is somewhat difficult to follow the decision of the learned Judges in this case. Pending a suit for partition one of the parties to the suit alienated one of the properties which formed the subject-matter of the suit to a stranger. Another party to whom a moiety of the property fell under the partition decree in the suit brought a separate suit to recover from the alienee the moiety in the property alienated. In the first place, the learned Judges held that the purchase was *lis pendens* and the purchaser was bound by the decree. But on the question whether the suit was barred by the provisions of section 47 of the Civil Procedure Code, the learned Judges held that it was not and that the suit was maintainable. It is clear that the term "representative" in section 47 is not restricted in its significance to a legal representative, such as an heir, executor or administrator; and the question has arisen who are the other classes of persons who come under the term "representatives" and it has been answered in *Ajodhya*

4. (1898) 2 Ch. 92.
5. (1883) 53 L.J. Ch. 166.
6. (1892) 1 Ch. 633.

Roy v. *Hardwar Roy*[1] by Sir Asutosh Mookerjee and Carnduff, JJ., as including any transferee of the interest of the decree-holder or judgment-debtor who so far as such interest is concerned is bound by the decree. Two tests have been propounded by those learned Judges for determining whether a particular person is a representative of a party to the suit, namely, (1) that some portion of the interest of the decree-holder or judgment-debtor which was originally vested in one of the parties to the suit, should have by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and (2) if there has been a devolution of interest, so far as such interest is concerned, that person should be bound by the decree. Applying these tests, there can be no doubt that the purchaser under the private sale *pendente lite* is a representative of the judgment-debtor. If the purchaser claimed under an execution sale pending suit, it may be that the Bombay High Court would have held following a course of decisions in that Court, that he is not a representative of the judgment-debtor (see *Narsinhbhat* v. *Bando Krishna*[2]) differing in that respect from the view held in Calcutta and Allahabad. See *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*[3] and *Gulzari Lal* v. *Madho Ram*.[4] There being no such conflict of views in the case of a private sale, we fail to see why the question is not one relating to the execution of the decree in the partition suit between a party to the suit and the representative of his opposite party and consequently a separate suit is not barred under section 47. We venture to submit that nothing that was said in *Bimal Jati* v. *Biranja Kuar*[5] takes away from the force of the observations in *Madho Das* v. *Ramji Patak*.[6]

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1. (1909) 9 C.L.J. 485.
2. (1918) I.L.R. 42 B. 411.
3. (1896) I.L.R. 24 C. 62 (F.B.)
4. (1904) I.L.R. 26 A. 447.
5. (1900) I.L.R. 22 A. 243.
6. (1894) I.L.R. 16 A. 286

NIRMALA SUNDARI DASSI *v.* DEVA NARAYAN DAS CHOUDHURI, I.L.R. 55 Cal. 269.

In this case a Hindu mother succeeding to her son purchased immoveable properties out of the incomes derived from the son's estate in the benami of another person and the accounts of incomes of these properties were mixed with those of the properties enjoyed by her as heiress of her son and the question was as to the nature of her right over the properties purchased by her and the course of succession to the same. There being no text of Hindu law on the point (see *Akkanna* v. *Venkayya*[1]) and it being accepted that a Hindu woman holding a qualified estate has absolute properties in the incomes derived therefrom, it seems clear on principle that she holds these incomes and the properties purchased therefrom in absolute right unless it is shown that she has incorporated them with the properties in which she has only a qualified right. In this respect the position may be likened to the case of an owner of a joint ancestral impartible estate deriving incomes from the estate and making purchases out of the same. In this connection reference may be made to *Parbati Kumari Debi v. Jagadis Chunder Dhabal*[2] and *Rani Jagadamba Kumari* v. *Wazir Narain Singh.*[3] In the first of these cases, both the accounts of the impartible estate and of the purchased properties were mingled together and still it was held by the Privy Council that the properties purchased with the incomes were not incorporated with the impartible estate and did not devolve by the rule relating to such an estate. The cases of a member of a joint family throwing his self-earnings or separate property in the common stock may also have an analogy to the present case. While the matter seems thus to be clear on principle, some dicta of the Privy Council in *Isri Dutt Koer* v. *Hansbutti Koerain*[4] have, we venture to think, obscured the issue. The decision of the Privy Council in *Saodamini Dasi* v. *The Administrator-General of Bengal*[5] was believed to have cleared up the confusion to some extent. The later decision of the Privy Council in *Nabakishore Mandal* v. *Upendrakishore Mandal,*[6] where it does not appear that the previous decision of the Privy Council in *Saodamini Dasi* v. *The Administrator-General of*

1. (1901) I.L.R. 25 M. 351 at 357: 12 M.L.J. 5.
2. (1902) I.L.R. 29 C. 433: 29 I.A. 82 (P.C).
3. (1922) I.L.R. 2 Pat. 319: 50 I.A. 1: 44 M.L.J. 503 (P.C).
4. (1883) 10 I.A. 150: I.L.R. 10 C. 324 (P.C).
5. (1892) 20 I.A. 12: I.L.R. 20 C. 433 (P.C).
6. (1921) 42 M.L.J. 253 (P.C).

Bengal[5] and the Indian decisions in *Akkanna* v. *Venkayya*,[1] *Subramanian Chetti* v. *Arunachalam Chetti*[7] which considered it, were referred to, there are some observations which go against the accepted notions on the question and lay down that it is upon those who assert that the acquired properties are her absolute properties to show that she treated them as her own, by her dealings with the same. When these observations were relied upon before the Madras High Court in *Ayiswaryanandaji Saheb* v. *Sivaji Rajah Saheb*,[8] the learned Judges declined to treat them as well-considered such as to justify their going back on the previous decisions. The nature of the estate held by a qualified owner in the properties or securities purchased out of the incomes has been examined fully in the judgment of Sir S. Subramania Aiyar in *Subramanian Chetti* v. *Arunachalam Chetti*[7] and it is impossible to add to what the learned Judge has said. The later observations of the Privy Council in *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar*[9] and *Nabakishore Mandal* v. *Upendrakishore Mandal*[6] have been fully considered by Sir C. V. Kumaraswami Sastriar in *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao*[10] and *Ayiswaryanandaji Saheb* v. *Sivaji Rajah Saheb*.[8] The view taken by the learned Judges in the case under notice does not materially differ from what has been said by the learned Judge in the above cases, though the learned Judges have not noticed the observations of the Privy Council in *Nabakishore Mandal* v. *Upendrakishore Mandal*.[6] As to treating the accounts of both the original estate and the acquired properties together, that circumstance is not entitled to much weight, as pointed out in *Akkanna* v. *Venkayya*[1] and *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*.[2]

BHAGWATI *v.* BANARSI DAS, I.L.R. 50 All. 371: 54 M.L.J 689 (P.C.).

Section 55, clause (1) of the Transfer of Property Act provides that, in the absence of a contract to the contrary, the seller is bound to discharge all incumbrances existing on the

1 (1901) I.L.R. 25 M. 351 at 360: 12 M.L.J. 5.
2. (1902) I.L.R. 29 C. 433 at 435: 29 I.A. 82 (P.C.).
5. (1892) 20 I.A. 12: I.L.R. 20 C. 433 (P.C.).
6. (1921) 42 M.L.J. 253 (P.C). 7. (1904) I.L.R. 28 M. 1.
8. (1925) I.L.R. 49 M. 116 at 151: 49 M.L.J. 568.
9. (1918) I.L.R. 42 M. 581: 46 I.A. 64: 36 M.L.J. 164 (P.C).
10. (1922) I.L.R. 46 M. 190: 43 M.L.J. 486 (F.B.).

property. In this case the sale-deed provided that if any incumbrance in respect of the whole or part of the property was discovered or part of the property sold and as a result of the claim the property pass out of the possession of the vendees the vendors should pay to the vendees the consideration of the sale-deed to the extent the property sold passes out of their possession. The High Court was of opinion that here there was a contract to the contrary within the meaning of the section and that the vendors were confined to the particular relief provided in the sale-deed and could not claim the money they had to pay the incumbrancer to prevent sale of the property in execution of a decree on such undisclosed mortgage. Their Lordships held otherwise. Their Lordships' view was that the provision made in the event of the vendees being put out of possession was an additional safeguard and not the sole remedy. Their Lordships were clear that "it did not contradict or restrict the wider language of the contract of sale (in this case the sale was declared to be free of all mortgages and covenants) or narrow or wipe out the obligations under the Statute." In this connection, one may with profit consult *Subramania Aiyar* v. *Saminatha Aiyar*,[1] where citing Kent and other authorities it was laid down: "the rule is that inasmuch as covenants in law are intended to be operative only when the parties themselves have omitted to enter into any contract respecting matters to which the covenants in law relate, the latter cease to have any force the moment such a contract is entered into, even though the contract expressly provides only for some of the matters covered by the covenants in law and is silent as to the rest." Some such view seems to have prevailed with the Judges of the High Court in this case. That view of the section was not accepted by the Privy Council in *Webb* v. *Macpherson*,[2] where their Lordships say that unlike under the English Law where the vendor's lien is a creation of the court of equity which could be modified to the circumstances of the case by the court, in India. the Statute declares a charge unless excluded by contract and you have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists and that there was no ground whatever for saying that that charge is excluded by mere personal contract to defer payment of a portion of the purchase-money or to take the pur-

1. (1897) I.L.R. 21 M. 69: 7 M.L.J. 319.
2. (1903) I.L.R. 31 C. 57: 30 I.A. 238: 13 M.L.J. 389 (P.C).

chase-money by instalments nor was it excluded by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. There the question was as regards vendor's charge as to purchase-money—here in respect of the vendor's liability to discharge incumbrances. Clearly, in their Lordships' view, the existence of any covenant in respect of it will not do but there must be some covenant inconsistent with the statutory liability.

SYED KHAN *v.* SYED EBRAHIM, I.L.R. 6 Rang. 169.

The certificate for leave to appeal to His Majesty in Council was ultimately granted by the Court in this case under section 109, clause (*c*), Civil Procedure Code. We are not satisfied that the decision is right in so far as it holds that section 110, Civil Procedure Code, had no application on the facts of the case. The fact that an appeal could have been preferred against the earlier order of 1925 does not conclude the question. As section 105, Civil Procedure Code, does not apply to appeals to His Majesty-in-Council, there is no reason why the validity of the order of remand of 1925 should not be attacked in the appeal against the ultimate decision. In the absence of a provision which makes the earlier order final unless appealed against at that stage, there is nothing to prevent the party from taking all grounds of objection against the decree in the appeal against the ultimate decree in the suit. He may or may not have the right to appeal against the earlier order but the non-appealing against that order at that stage does not conclude the matter against him. In this view, the court was bound to see if the requirements of section 110, Civil Procedure Code, were complied with as regards the value of the subject-matter in dispute, understanding the latter term to include the questions dealt with in and decided by the earlier order.

KUNDAN LAL *v.* BISHESHAR DAYAL, I.L.R. 50 All. 95.

There is much loose thinking in respect of actions for money in the case of sales which have fallen through. Three kinds of actions are possible—action for money had to the use of the plaintiff to which Art. 62 is applicable, for existing consideration failing to which Art. 97 is applicable, action for damages for breach of covenant for title or damages for non-delivery of possession to which Art. 116 is applicable. The remedies on these different kinds of actions are not co-extensive and may not arise on the same set of facts. As pointed out by their Lordships of the Privy Council in *Hanuman Kamut* v. *Hanuman Mandar,*[1] where the sale is voidable at the instance of a junior member of a Mitakshara family, a claim for the return of purchase money is properly a claim on existing consideration failing to which Art. 97 is applicable. If the sale conveyed nothing and was totally void, then the action would be one for money had to the use of the plaintiff. Though no title passed, if possession passes, the action as for existing consideration failing may be brought—deprivation of possession being the date of accruing of the cause of action. (See *Venkatarama Aiyar* v. *Venkatasubrahmanian*[2]). In both these cases, a suit for damages for breach of covenant for title would also lie, the starting point being the date of the sale itself but the damages obtainable would not necessarily be the whole amount of the purchase money. In certain circumstances it might be more, in others less. It is somewhat difficult to understand why or how an action is maintainable for the purchase money itself if the defendant merely failed to deliver possession, and there was no failure of title. The contract having passed beyond the stage of executory contract it is not open to the plaintiff to repudiate the contract of sale and bring an action for money had and received. One should fancy that the only damages recoverable on failure to deliver possession would be mesne profits or costs of action for getting possession if the property was in possession of strangers. In cases where an action for money had and received or as on existing consideration failing may be brought it may be, an action on the covenant for title also might lie as pointed out above, but the relief available on the one kind of action is not quite the same as on the other and there is no good reason why the party should not adopt any particular

1. (1891) 18 I.A. 158.
2. (1899) I.L.R. 24 M. 27: 10 M.L.J. 217.

line of action he considers proper in the circumstances of the case. There is no law which limits a plaintiff in such a situation to one or other kind of action. If a particular kind of action is appropriate under the law, it is no concern of the Court to say that it ought to have been another so as to invite the application of a more rigorous rule of limitation. The judgment under review needlessly confesses helplessness to relieve the plaintiff.

NARSINGH DAS *v.* GOKAL PRASAD, I.L.R. 50 All. 113.

It is laid down in this case that if a witness dies before cross-examination, his evidence is inadmissible. The contrary is laid down in *Maharaja of Kolhapur* v. *Sundaram Aiyar.*[1] The latter view seems to be more in accordance with the English practice though it is agreed to on all hands that the weight attaching to such deposition is slight. There is a similar line of cases relating to affidavits when the deponent is not available for cross-examination.

MATHURA KURMI *v.* JAGDEO SINGH, I.L.R. 50 All. 208.

The Privy Council have laid down in *Raghunath Prasad Singh* v. *Deputy Commissioner of Partabgarh*[2] that the substantial question of law within the meaning of section 110 need not be a question of law of general interest but may be only a substantial question of law between the parties to the suit. While admitting this, their Lordships seem to be straying into the wrong groove when they say that the case is not likely to "afford occasion for the discussion or enumeration of any new principle of law." Having regard to the latest pronouncement of the Privy Council in *Narasingerji* v. *Parthasaradhi Rayanam Garu*[3] it would seem to be rather a strong thing to say that the question on the construction of a document whether it is a mortgage by conditional sale or a sale could involve no substantial question of law.

RAJAH OF RAMNAD *v.* MUTHANAN SERVAI, I.L.R. 51 Mad. 449: 53 M.L.J. 289 (P.C.).

In this case there was great divergence of judicial opinion. The whole thing turned on the Courts' view of a lease transaction by the Ramnad Raja. He gave a lease of a certain village

1. (1924) I.L.R. 48 M. 1.
2. (1927) 54 I.A. 126.
3. (1924) I.L.R. 47 M. 729: 51 I.A. 305: 47 M.L.J. 809 (P.C.).

on a rent of Rs. 420 a year for a fixed period of 30 years. According to the customary rules of distribution of the produce, a certain proportion was taken for payment to the village officers, certain portion for charity and the rest as landlord's share. The lease provided for payment of rent and payment of the share to charity but did not provide as to village officers though the lessee was taking it and handing it over to the village officers. Under Act II of 1894, the Government provided for payment of fixed salary to the village officers, and the question was what under these circumstances, the remedy of the landlord was? The view of the majority in the High Court (see *Tiruneelakantam Servai* v. *Rajah of Ramnad*[1]) was that the landlord's remedy was to have, under section 27 of the Act, the rent raised and that he had no right to sue for the transfer of that share to himself. Their view was that the lease amounted to a transfer of the entire share including the village officers' to the lessee with the liability to the village officers. If the liability disappeared, the benefit of it should go to the lessee and the landlord could not claim the amount. Whatever right the landlord had was under the Statute. Their Lordships differed from the High Court and held that the lease had no such effect, that it did not transfer the right to the village officers' share at all to the lessee his part in the affair being that of an agent. When the liability ceased, he had to make it over to the landlord, for whom he was collecting and in the discharge of whose duty he was disbursing.

SAKALAGUNA NAYUDU *v.* CHINNA MUNISAMI NAYAKAR, I.L.R. 51 Mad. 533: 55 M.L.J. 198 (P.C.).

This judgment of the Privy Council affirms the judgment of the High Court of Madras in *Muniswami Nayudu* v. *Sagalaguna Nayudu*[2] which distinguished *Papa Naidu* v. *Muniswami Aiyar.*[3] The latter case had very little vitality left after it was distinguished in *Muniswami Nayudu* v. *Sagalaguna Nayudu.*[2] Their Lordships recognise the validity, assignability and binding nature of an option to purchase given for consideration under a sale. In *Papa Naidu* v. *Muniswami Aiyar*[3] such an option was treated in slightly different circumstances to be a mere standing offer to sell and revocable before it was followed up by a tender of purchase money.

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1. (1922) I.L.R. 46 M. 177: 43 M.L.J. 158.
2. (1926) I.L.R. 49 M. 387: 51 M.L.J. 229.
3. (1923) I.L.R. 46 M. 30: 42 M.L.J. 432.

RAJAGOPALA AIYANGAR *v.* SRINIVASA RAGHAVA IYENGAR, I.L.R. 51 M. 627: 55 M.L.J. 30.

With respect, we agree that on the facts of the case, action was not barred. Section 7 could have no application when there is no person who as managing member could give a discharge without the concurrence of the other member. Where the alienation is by the father and the father is still alive, one of the sons though eldest could not be the manager and could not give a discharge without the concurrence of the other members and as such section 7 could have no application. Mr. Justice Bhashyam Aiyangar clearly points out in *Ahinsa Bibi* v. *Abdul Kader Sahab*[1] the essential conditions for the application of S. 7 to cases like the present. *Vigneswara* v. *Bapaya*[2] is taken by Sir Bhashyam Aiyangar as a case where the elder brother was the managing member, the father having died, though the judgment does not refer to the fact; the reason given in *Vigneswara* v. *Bapaya*[2] is manifestly untenable. The case in *Doraisami Serumadan* v. *Nondisami Sahivan*[3] does not seem to be open to this objection. There it was an alienation by the mother as guardian both the sons being minors and on the attaining of age by the elder of the two sons he became a manager and there is no reason why section 7 should not apply to such a case. The language of Art. 44, it was argued, attracted as consequence the non-applicability of section 7. That is a different question and did not arise in this case. The Privy Council in *Jawahir Singh* v. *Udai Parkash*[4] had nothing to do with the case of the managing member. *Ganga Dayal* v. *Mani Ram*,[5] one of the cases relied upon in the judgment, which was the subject of appeal before the Privy Council, expressly excludes the case of the managing member.

BHOGILAL BHIKACHAND *v.* ROYAL INSURANCE CO., LTD., I.L.R. 6 Rang. 142: 54 M.L.J. 545 (P.C.).

This is an interesting judgment of the Privy Council and specially noteworthy for the observations of their Lordships on several questions of practice and evidence. Section 153 and section 155 of the Indian Evidence Act deal with the question as to how far it is permissible to let in evidence in rebuttal and to

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1. (1901) I.L.R. 25 M. 39.
2. (1893) I.L.R. 16 M. 436: 3 M.L.J. 216.
3. (1912) I.L.R. 38 M. 118: 25 M.L.J. 405.
4. (1926) I.L.R. 48 A. 152: 53 I.A. 36: 50 M.L.J. 344 (P.C.).
5. (1908) I.L.R. 31 A. 156.

impeach the veracity of a witness who is examined. Their Lordships observe that these sections must be strictly construed and narrowly interpreted as otherwise the courts will have to embark on an enquiry as to matters that have really no bearing upon the issue in contest between the parties. The question is elaborately discussed in *Attorney-General* v. *Hitchcock*[1] and the learned Judges define with some particularity the exact class of answers which can be contradicted. As in the present case, questions regarding the alleged offer of a bribe to the witness are discussed in that decision. Under section 155, clause (2) evidence is permissible to show that a witness has been bribed or has accepted an offer of a bribe. It is clear that the statement of a witness denying an offer of a bribe to him cannot be contradicted merely by proposing to examine a witness to show that the bribe was offered unless it is further alleged that the bribe was accepted. The mere offer of a bribe to a witness which is not accepted by him does not show any bias or partiality on the part of the witness nor does it affect his credit but it only tends to discredit the testimony of the person who offered the bribe. The case of a demand of a bribe by a witness is clearly different. Similarly also evidence can be let in to show that a person attempted to procure witnesses by offer of a bribe as it tends to show partiality on the part of the witnesses. Their Lordships point out that the evidence in this case of the police officer and the company manager was not improperly received under section 153 and section 155 but that the evidence of the other two persons was not properly receivable under the sections. The judgment under notice further proceeds to deal with the duty of court when it is brought to its notice that an attempt has been made to procure evidence by offers of a bribe.

P. C. THEVAR *v.* V. SAMBAN AND OTHERS, I.L.R. 6 Rang. 188.

The first question raised in this case was whether a suit for a mere declaration that the suit temple and its properties constituted a public trust was sustainable in the absence of sanction under S. 92, Civil Procedure Code. The recent decision of the Privy Council in *Abdur Rahim* v. *Syed Abu Mahomed Barkat Ali Shah*[2] seems to conclude the point in favour of the affirmative answer. The inclination of the judgment under notice the other way is no longer supportable by reference to clause (*h*)

1. (1847) 1 Exch. 91.
2. (1927) 54 M.L.J. 609 (P.C).

of section 92. The Privy Council point out that section 92 does not require that every suit founded upon any alleged breach of trust created for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of section 92. Only suits claiming any relief specified in sub-section (1) should be instituted in conformity with the provisions of section 92, clause (2). They further point out that clause (*h*) of section 92, clause (1) must be construed on general principles of construction as meaning relief of the same nature as clauses (*a*) to (*g*). The *obiter dictum* of the Judges in the case under review that the suit is not sustainable without the sanction of the Advocate-General is therefore incorrect. The second point raised was whether a suit for a bare declaration without any consequential relief was barred under section 42 of the Specific Relief Act. The judgment holds that as there was no consequential relief prayed for the suit does not lie under section 42 and that apart from that section the Court has no power to pass a declaratory decree. On the latter point, a different view has been taken by the Madras High Court in *Ramakrishna Pattar* v. *Narayana Pattar*[1] relying on the observations of the Privy Council in *Robert Fischer* v. *Secretary of State for India.*[2] Even assuming that the suit must be one strictly coming under section 42 it is not clear that any consequential relief was properly necessary in the circumstances. The decision in *Jamaluddin* v. *Mujtaba Husain and others*[3] recognises that a similar suit for a declaration can be brought to establish the public nature of the trust. It may be noted that the suit in *Abdur Rahim* v. *Syed Abu Mahomed Barkat Ali Shah*[4] was also one where the plaintiffs prayed that "it may be declared that the suit properties may be declared wakf and that the defendants may be restrained from obtaining possession either directly or by realising rents from the said lands." No objection was taken to the frame of the suit and the Privy Council hold that the suit is sustainable.

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1. (1914) I.L.R. 39 M. 80: 27 M.L.J. 634.
2. (1898) I.L.R. 22 M. 270 (P.C.).
3. (1903) I.L.R. 25 A. 631.
4. (1927) 54 M.L.J. 609 (P.C.).

Reilly, J. Cr. Appeal No. 293 of 1928.
18th September, 1928.

Criminal Procedure Code, Sec. 476—Finding that complaint is necessary in the ends of justice—Necessity of—Complaint for an offence committed before the Court and another offence arising out of the same facts—Validity of.

Under Sec. 476, Criminal Procedure Code, it is incumbent on a Court to record a definite finding, after giving reasons therefor, that the complaint is necessary in the ends of justice.

There is nothing in law which prevents a Court from filing a complaint in respect of an offence committed before it along with another offence arising out of the same facts for which under the law no previous sanction is necessary, as for example, fabrication of false evidence and forgery.

V. L. Ethiraj and *A. Lakshmayya* for Appellant.

The Public Prosecutor for the Crown.

N. S.

Madhavan Nair and
Thiruvenkatachariar, JJ. C.R.P. No. 586 of 1926.
18th September, 1928.

Civil Procedure Code, Secs. 63 and 73—Attachment by superior Court—Sale by inferior Court and order of rateable distribution—Validity—Dismissal of execution petition to clear off the Court's file—Effect.

Where in ignorance of an attachment of the properties by a Sub-Court, a District Munsif sold the properties in execution of a decree on his own file and distributed the assets to two decree-holders,

Held, that the order of the District Munsif was not without jurisdiction, the irregularity in the sale being cured by the provisions of Sec. 63 (2), Civil Procedure Code, but that the rateable distribution of the assets being in contravention of Sec. 73 could be questioned by the party affected in a fresh suit, as Sec. 63 (2) does not legalise such a wrong payment.

Where an execution application was dismissed by the Court to clear off its file and not on account of any default on the part of the decree-holder, it must be treated as still pending for the purpose of deciding his right to rateable distribution.

T. S. Anantharaman for Petitioner.

B. Somayya, P. Vedachalam Aiyar, E. Krishnamurthi and *K. S. Narayana Aiyar* for Respondent.

N. S.

N R C I

Reilly, J. C. R. P. No. 14 of 1928.
19th September, 1928.

Madras Estates Land Act—Ex parte *decree in rent suit—Order rejecting application to set aside—Appeal.*

An order rejecting an application to set aside an *ex parte* decree in a rent suit is not appealable.

T. L. Venkatarama Aiyar for Petitioner.

E. Krishna Aiyar for Respondent.

N. S.

The Chief Justice,
Beasley and Mackay, JJ. O. P. No. 129 of 1928.
19th September, 1928.

Income-tax Act, Sec. 10 (2), (3)—Interest payable in respect of thavanai loans—Interest accumulated and paid in a particular year—Amount if can be deducted in assessing the income for that year.

Interest payable on thavanai loans accumulated for a number of years and paid subsequently in a particular year cannot be considered to have been paid during that year so as to entitle the assessee to have that amount deducted in assessing the income, because thavanai loans are in the nature of deposits, the interest accruing in regard to which must be deemed to have been paid and received on the expiry of the thavanai period.

43 M. 629 followed.

M. Patanjali Sastri for Commissioner of Income-tax.

R. Kesava Aiyangar for Assessee.

N. S.

The Chief Justice,
Beasley and Mackay, JJ. O. P. No. 130 of 1928.
19th September, 1928.

Income-tax Act, Sec. 4 (2)—Resident in British India—Separate establishment for wife and children—Assessee coming and residing on a number of occasions.

Where it was proved that the assessee who was a resident of Ceylon had a separate establishment within British India in which his wife and children were living and he himself was coming and residing with his wife and children on a number of occasions during the year of assessment,

Held, that the assessee must be deemed to be a resident of British India and liable for income-tax.

V. V. Srinivasa Aiyangar and *K. S. Rajagopalachari* for Assessee.

M. Patanjali Sastri for Commissioner of Income-tax.

N. S.

BISHESHAR NATH *v.* CHANDU LAL, I.L.R. 50 All. 321.

With respect, we think, that this judgment is good sense and the only wonder is that there should be so much conflict on this simple matter. Under the English Law, the mortgagee is entitled to pursue all his remedies at the same time; he may sue on the personal covenant; he may sue for sale or foreclosure and he may also apply for the appointment of a receiver. In this country also, there is no question but the mortgagee can sue on the personal covenant alone, the only obstacle being that presented by Order 34, Rule 14, that is to say that he cannot sell the hypotheca in execution of the personal decree. Order 2, Rule 2 is no bar to his subsequently instituting a suit for sale (Order 34, Rule 14). Now if he could pursue the two remedies independently, why should he not combine the two? As Sir Bhashyam Aiyangar has pointed out in *Mallikarjunadu Setti* v. *Lingamurthi Pantulu*[1] there might be difficulty in his way in his so doing by reason of the rules as to venue (Ss. 16 and 20, Civil Procedure Code). Presumably to obviate such reduplication of proceedings, the Civil Procedure Code has provided in Order 34, Rule 6 a mode of providing relief on the personal covenant as well in all cases irrespective of the question whether the defendant is within the jurisdiction of the Court or not and that remedy is available only if the proceeds of the sale turn out to be insufficient—per contra in *Tirumalai Kadirvelusami Naicker* v. *The Eastern Development Corporation Ltd.*[2] But the Courts have largely proceeded on the assumption that the remedy provided under Order 34, Rule 6 is the only remedy available to the mortgagee. That seems to be a gratuitous assumption. As pointed out by the Judges in this case, there is no statutory prohibition against giving a personal decree straightway as the personal covenant—we would add—where having regard to the rules as to venue, such a decree can be passed—unless one could be spelt out from the enacting of Order 34, Rule 6. To us this seems to be an additional remedy and by no means the exclusive remedy though the Court may in its discretion decline to enforce both the remedies at the same time. This question apart, the divergence of judicial opinion has been as to whether the Court would at all give the relief when there has been no sale and further as to what circumstances make the amount legally irrecoverable personally from the mort-

1. (1900) I.L.R. 25 M. 244 at 287: 12 M.L.J. 279 (F.B.).
2. (1917) 33 M.L.J. 382.

gagor even though a personal covenant exists. There was further conflict as to whether a composite decree as it is called declaring liability to be proceeded against personally in the event of the sale proceeds being insufficient. On this last question, the Privy Council has expressed itself in favour of its validity in *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha.*[3] On the second question, some cases hold exoneration of some of the defendants or some of the properties before the suit will affect his right. Others hold that the mortgagee can proceed against such of the mortgagees and such of the mortgage properties as he chooses and that circumstance cannot in any affect his rights. The latter seems to be the sounder view. On the first question, what this case holds and opinion seems to be converging to that point is that when the mortgaged properties or any part of them cannot be sold on account of the failure of title of the mortgagee or on account of any supervenient circumstance, such as revenue sale or sale on a prior mortgage, the mortgagor need not go through the farce of a sale before applying under Order 34, Rule 6. (*Periyasami Kone* v. *Muthia Chettiar,*[4] *Satish Ranjan Das* v. *Mercantile Bank of India, Ltd.,*[5] and *Chand Mall Babu* v. *Ban Behari Bose*[6]). The section does not seem to give the mortgagee power to abandon his claim against the mortgage properties and proceed against the other properties of the mortgagor under this rule. (*Varadiah* v. *Raja Kumara Venkata Perumal,*[7] *Periyasami Kone* v. *Muthia Chettiar*[4] and *Satish Ranjan Das* v. *Mercantile Bank of India, Ltd.*[5]) He cannot pretend to have complied with the section by selling a part and abandoning his claim against the rest (*Arunachala Velan* v. *Venkatarama Aiyar*[8]). In *Srinivasa Aiyangar* v. *Cundaswamy Naiker*[9] it was held that after private purchase of a portion of the properties from some of the judgment-debtors, the decree-holder can proceed against the other properties of the vendors though not against the others. In another case, Mr. Justice Sundar Lal in an Oudh case *Ram Raghubir* v. *Imami Begam*[10] seems to have held that if the mortgagee finds difficulty in selling on account of prior mortgages he might well abandon his remedy against the property and proceed under Order 34, Rule 6. That is practically making the preliminary conditions of the section not essential conditions for

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3. (1918) I.L.R. 47 C. 370 : 46 I.A. 294 : 36 M.L.J. 215 (P.C.).
4. (1913) I.L.R. 38 M. 677.
5. (1917) I.L.R. 45 C. 702.
6. (1923) I.L.R. 50 C. 718.
7. (1913) 26 M.L.J. 83.
8. (1919) 38 M.L.J. 93.
9. (1914) 26 M.L.J. 375.
10. (1909) 9 I.C. 403.

the exercise of jurisdiction but mere considerations for the exercise of the discretion—not impossible view if the original assumption of ours is right and not the contrary.

NARSINGH RAO *v.* MAHALAKSHMI BAI, I.L.R. 50 All. 375: 55 I.A. 180 : 55 M.L.J. 42 (P.C.).

The question in this case was as to the proper construction of a deed of settlement under which the settlor provided that his wife should own the property as he owned it but that if a son should be born within 16 years to his son who by reason of his misconduct he wanted to disinherit, that son on attaining majority should get the property, on failure of such son, she might appoint the son of her daughter as heir or might adopt somebody but even those persons it was provided should hand over the property to a son that might be born to his son *B* if perchance one should be born after the specified period of 16 years. There was no dispute that if the estate conferred on the wife was an absolute estate subject to defeasance on the birth of a grandson, the condition being invalid under the rule of Hindu Law against gifts in favour of unborn persons, the condition would fail and the absolute estate given to the wife would remain, but the High Court held having regard to the various provisions as to further devolution, etc., that the wife had only an estate limited in duration to the grandson's attaining age and on the contingency happening there was an intestacy and the property should go to the heirs of the settlor. Their Lordships rejected this latter view as it failed to give effect to the dominant intention of the testator of excluding the son. At page 389 their Lordships cite with apparent approval the passage from Mayne which says that property gifted or devised by the husband to the wife would descend to her heirs but that the wife would have no power of alienation in respect of such property. The conception of *Swamya* (ownership) without *Swantantrya* (power of disposition) is familiar to the Mitakshara but seemed to be given the quietus by decisions of the Board in *Surajmani* v. *Rabi Nath Ojha*,[1] *Bhai Das Shivdas* v. *Bai Gulab*[2] and *Ramachandra Rao* v. *Ramachandra Rao*.[3] It is revived again by the observation of the Board in this case. No doubt, those decisions of the Board in the first two cases were given where the word 'malik' occurred and in *Ramachandra*

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1. (1907) I.L.R. 30 A. 84 : 35 I.A. 17 : 18 M. L J. 7 (P.C.).
2. (1921) I.L.R 46 B. 153 : 49 I.A. 1 : 42 M.L.J. 385 (P.C.).
3. (1922) I.L.R. 45 M. 320: 49 I.A. 129: 43 M.L.J. 78 (P.C.).

Rao v. *Ramachandra Rao*[3] the question was not decided as the decision went on a point of *res judicata*. In the recent case from Patna, *Hitendra Singh* v. *Maharajah of Darbhanga*,[4] the point was much discussed in the High Court (see *Hitendra Singh* v. *Maharajadhiraj Sir Rameswar Singh*[5]). Their Lordships on appeal seem to look upon the question as one between life-estate and absolute estate and not one between a heritable estate and a disposable estate and draw attention to section 8 of the Transfer of Property Act and finally hold that the gift to the wife in the case conveyed to her all rights of ownership. The words in the deed will be found to be only "the said Mussamat shall hold possession of the gift properties and enjoy the produce thereof generation after generation and I the executant and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties." "Malik" has been held to confer such power of alienation by implication and the above decision in the Patna case would seem to hold that words of inheritance will have that effect. After that it is difficult to see what words will be held not to include such power when a heritable estate is also intended to be given. If once it is held that certain words include such power, further words restricting alienation will be considered repugnant according to well-recognised rules of construction.

PERUMAL PILLAI *v.* PERUMAL CHETTY, I.L.R. 51 Mad. 701 : 55 M.L.J. 253 (F.B.).

While dealing with *Ali Bahadur Beg* v. *Rafiullah*[6] we pointed out that the view taken in the Madras cases which that case purported to follow required reconsideration in the light of the Privy Council decision in *Lachmi Narain Marwari* v. *Balmakund*.[7] We see that the Full Bench has taken that view and has overruled *Subbarayudu* v. *Ramadasu*,[8] so that after a preliminary decree for sale or redemption failure to bring on record the legal representatives of any deceased party to the suit within the limitation period does not entail as consequence the abatement of the suit. The same rule would apply to partition suits and suits for account.

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3. (1922) I.L.R. 45 M 320· 49 I.A. 129: 43 M.L.J. 78 (P.C.).
4. (1928) L.R. 55 I.A. 197 : A.I.R. (1928) P.C. 112.
5. (1925) I.L.R. 4 Pat. 510.
6 (1926) I.L.R. 49 All. 310.
7. (1924) I.L.R. 4 Pat. 61: 51 I.A. 321: 47 M.L.J. 441 (P.C.).
8. (1921) I.L.R. 45 M. 872: 42 M.L.J. 301.

DISTRICT BOARD, SIALKOT *v.* SULTAN MUHAMMAD KHAN AND OTHERS, I.L.R. 9 Lah. 340.

This judgment holds that the profession tax leviable under S. 30 of the Punjab District Boards Act (XX of 1883) can be levied only at a flat rate and that a notification imposing a tax on a graduated scale varying with the income of the person assessed is *ultra vires* as it is really imposing a second income-tax, which the local Legislature cannot authorise without the sanction of the Governor-General in Council. Similar considerations, however, will not be applicable to the profession tax leviable under the Madras District Municipalities Act (V of 1920). The Act itself provides for a graduated scale varying with the income of the assessee, *vide* S. 93 and Schedule IV. The previous Act IV of 1884 (Madras) also authorised such a scale. The judgment under notice seems to have overlooked the distinction between the liability to the tax and the rate of the tax. The class of persons on whom the tax is imposed is defined with respect to the practice of a profession, trade or calling and not to the income which is made by the assessee. Once the persons on whom the liability is cast is thus determined, the rate is fixed with reference to the income. The nature of the tax is in its essence, different from an income-tax.

NAURANG RAI *v.* KIDAR NATH, I.L.R. 9 Lah. 400.

The provisions of section 345, Criminal Procedure Code, are exhaustive of the right to compound offences. In the absence of a provision in the statute permitting the Court to make an enquiry as to the factum of an alleged compounding of an offence of the class specified in section 345, clause (2) it is difficult to hold that the Court has the power to do so. Specially so as such an agreement is inoperative until the Court sanctions it. It would follow that in such a case as the above where the parties resile from the agreement prior to the granting of the sanction by the Court, there is no purpose in making an enquiry into the disputed question whether there was an agreement to compound. Similar considerations will apply even in respect of the offences under clause (1) under the special circumstances mentioned in sub-clauses (4) and (5) of the section.

SAIYID MAHOMED FARIDUDDIN AHMAD *v.* SAIYID AHMAD ABDUL WAHAB, I.L.R. 7 Pat. 144.

This decision is in direct conflict with the decisions of the Calcutta and the Madras High Courts, see *Subbarami Reddi* v.

Pattabhirama Reddi[1] and the cases referred to therein. No doubt the High Court of Allahabad has taken the view that it is open to the Court under section 34 (*c*) of the Guardians and Wards Act to investigate the accounts exhibited by the guardian and to amend the same by striking out objectionable items and to direct the guardian to pay the balance found due on a just and true account. While it is desirable to have a summary procedure for such remedies subject to a clear provision for appeal, it is difficult to hold that the language of the Act justifies such wide powers. The contrary conclusion that it is only the admitted balance as per the exhibited accounts that can be directed to be paid into Court and that the remedy against the guardian for enforcing his liability on a true and just account after investigation and scrutiny is by a regular suit seems to be the proper view in the light of the policy of the Act and especially so because the words "on those accounts" in section 34 will otherwise be superfluous.

RAMGULAM TELI *v.* KING-EMPEROR, I.L.R. 7 Pat. 205.

There is now a settled divergence of views among the High Courts as regards the stage at which an accused in a criminal case is entitled to get copies of the statements of prosecution witnesses recorded under section 161. The amended section 162 of the Criminal Procedure Code has enlarged the privileges of the accused in the matter. Still some Courts have restricted the right of the accused to get copies (subject to the proviso of section 162) to a late stage of the trial notwithstanding there is nothing in the section itself to justify that view. The Madras High Court held in *In re Peramasami Rayudu*,[2] that it is only after some foundation is laid in cross-examination of a particular prosecution witness that there is some contradiction between the statement in Court and the statement before the police, that the accused can invoke the provisions of section 162. There is nothing in the section to justify that view. A literal reading of the section will make it appear that the accused can call for the copy of the statement *when* any witness is *called* for the prosecution, *i.e.*, when the witness is put into the box by the prosecution. This is the view taken by the present judgment. There is no reason why the plain meaning of the language should not be adopted. The reference to the object of giving the copy to

1. (1926) 51 M.L.J. 249.
2. (1926) 91 I.C. 532: A.I.R. 1926 M. 183.

the accused which is to enable him to contradict the witness under section 145 of the Indian Evidence Act and the difficulties to the prosecution in being asked to give a proof of their case to the accused are not relevant considerations that can be taken into account to justify an additional restriction on the rights of the accused which is not to be found in express terms in the section itself.

SUNDER MULL *v.* SATYA KINKER SAHANA, I.L.R. 7 Pat. 294: 54 M.L.J. 427 (P.C.).

Some misapprehensions likely to be caused by some expressions used by their Lordships in the earlier cases of *Nasir Begam* v. *Rao Raghunath Singh*[1] and *Ram Bujhawan Prasad Singh* v. *Nathu Ram*[2] are cleared by the judgment in this case. The authority of the Karta to borrow on security of family property being limited by proof of necessity, a general plea of "no necessity" puts the onus on the lender to show that both the borrowing and the terms thereof were within the authority. Their Lordships point out that the statement in the first of the two cases mentioned above that that the Karta had authority to borrow only "upon reasonable commercial terms" does not mean that the Court can limit the stipulation for interest only to what may be described as the current rate of interest upon mercantile transactions or to any publicly announced and official rate of interest for loans generally. The expression really means "such terms as can be arranged *freely* between borrower and lender under the circumstances of the particular case." It necessarily follows that the terms of previous borrowings may be relevant evidence in particular cases and their Lordships point out that the observations in the second case do not go so far as to hold that in no case can they be relevant.

It may be noted that the Privy Council take some pains to distinguish the facts of the earlier cases because they observe that "they are binding upon their Lordships and of course must be loyally followed in their application." There are, however, instances where their Lordships have held themselves not bound by previous decisions of the Board. *Baijnath Prasad Singh* v. *Tej Bali Singh*[3] and *Brij Narain Rai* v. *Mangal Prasad Rai*.[4]

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1. (1919) L.R. 46 I.A. 145: I.L.R. 41 A. 571: 36 M.L.J. 521 (P.C).
2. (1922) L.R. 50 I.A. 14: I.L.R. 2 Pat. 285: 44 M.L.J. 615 (P.C).
3. (1921) L.R. 48 I.A. 195: I.L.R. 43 A. 228: 40 M.L.J. 387 (P.C.).
4. (1923) L.R. 51 I.A. 129: I.L.R. 46 A. 95: 46 M.L.J. 23 (P.C).

C. V. N. C. T. CHIDAMBARAM CHETTIAR *v.* MA NYEIN ME AND OTHERS, I.L.R. 6 Rang. 243.

The rule of succession in the case of a Hindu convert to Mahomedanism was stated by Macnaghten in his Principles of Hindu Law, Vol. II, as follows: "The heirs according to Hindu Law will take all the property which the deceased had at the time of his conversion and the devolution of subsequently acquired property will be governed by the Mahomedan Law." After the passing of the Caste Disabilities Removal Act of 1850 the convert does not lose any of his rights of property and the first part of the rule as stated by Macnaghten will not be correct. Mayne in his Hindu Law and Usage has given reasons for doubting the correctness of the same. The decision under review examines the question in detail in the light of the authorities relied on by Macnaghten as precedents and finally holds that the Hindu relations are not entitled to succeed to any of the properties of the deceased convert. The question of succession will be governed by the law to which the deceased was subject at the time of his death. In the analogous case of a Hindu convert to Christianity, the question has been considered by the Privy Council in *Kamawati* v. *Digbijai Singh*.[1] There can be no doubt, therefore, that even in the present instance the Hindu relations who are not heirs under the Mahomedan Law cannot successfully lay claim to succeed to the properties or share in the same.

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1. (1921) I.L.R. 43 A. 525: 42 M.L.J. 87 (P.C.).

ABDUR RAHIM *v.* MAHOMED BARKAT ALI, I.L.R. 55 Cal. 519: 54 M.L.J. 609 (P.C.).

This decision of their Lordships sets at rest some of the doubts that have been entertained on the construction of section 92 of the Civil Procedure Code . In *Mufti Ali Jafar* v. *Fazal Husain Khan* [1] a division bench of the Allahabad High Court held that a suit by some persons interested in a charity for a declaration that an improper alienation by the trustees of the charity was not binding on the same would not be maintainable without the sanction of the Advocate-General, having regard to the provisions of section 92 of the Code. In that case, the learned Judges did not consider carefully the various clauses of the section or its scope having regard to its previous history under the prior codes of Civil Procedure. The learned Judges were of opinion that all suits based on a breach of a public religious or charitable trust could be brought only in conformity with sub-section (1) of section 92 of the Code and clause (*h*) should be read generally and not *ejusdem generis* with the previous clauses, a view which would render unnecessary the enactment by the Legislature of so many clauses carefully worded having reference to the previous decisions. Their Lordships of the Privy Council have carefully pointed out in the case under notice the limits of the rule laid down in *Vagliano's case*[2] that the previous state of the law should not be considered in the construction of statutes and have come to the conclusion that a suit by some persons interested in a charity for a declaration against the alienees of the charity properties that an improper alienation by the trustee is not binding on the charity and for an injunction against the alienees restraining them from receiving the rents of those properties would be maintainable even though not brought in conformity with the provisions of section 92 (1) of the Civil Procedure Code. This view of their Lordships upholds the Full Bench decision of the Madras High Court in *Venkataramana Aiyangar* v. *Kasturiranga Aiyangar*[3] which from the arguments, as reported, does not appear to have been cited before the Board. It is somewhat significant that a single Judge of the Madras High Court in *Innasimuthu Pillai* v. *Rev. Lutz*[4] followed the Allahabad decision after distinguishing the Full Bench deci-

1. (1922) I.L.R. 44 A. 622.
2 (1891) A.C. 107.
3 (1916) I.L.R. 40 M 212: 31 M.L.J. 777 (F.B.).
4. (1926) 24 L.W. 286.

sion of the Madras High Court on some ground which is not very clear. The conclusion of their Lordships on this part of the case may be stated to be that section 92 has only reference to and bars suits for the reliefs specified and against the trustees, unless they are brought in the manner provided in sub-section (1). In this view, both the decisions in *Mufti Ali Jafar* v. *Fasal Husain Khan*[1] and *Innasimuthu Pillai* v. *Rev. Lutz*[4] would in effect be overruled.

There is one other point that has to be noticed on this part of the case, namely, whether in a suit brought under section 92 of the Code, a stranger who is an alienee of the trust properties improperly alienated away can be made a party defendant along with the defaulting trustee and any reliefs can be given against him. Before this decision of the Privy Council there has been a considerable body of authority in this country that the alienee cannot be directed in a suit under section 92 of the Civil Procedure Code to deliver possession of the properties to the new trustee appointed under the decree consequent on a declaration of the invalidity of the alienation to him by the defaulting trustee, though it has been held that a declaration can be given in the presence of the purchaser that the alienation in his favour is not binding on the charity and that for the purpose of this declaration, the alienee is a proper party though not a necessary party to a suit under section 92 of the Civil Procedure Code. See the judgment of Mookerjee, J., in *Gholam Mowlah* v. *Ali Hafiz*[5] where all the prior decisions are collected and *Ramrup Goshain* v. *Ramdhari Bhagat.*[6] There are also some decisions of the Madras High Court given by Sir John Wallis, C. J., in *Raghavalu Chetty* v. *Pollati Sitamma*[7] and *Rangasami Naidu* v. *Chinnasami Aiyar*[8] to the effect that the alienee is not even a proper party in a suit under section 92 and no declaration can even be granted against him that the alienation to him is not binding on the trust and that the alienee must be removed from the record of the suit as a person who is an improper party to the suit under section 92 to which the only proper defendants would be the trustees of the charity. Again, Sir Lancelot Sanderson, C. J., would, on the construction of Order 1, Rule 3 of the Civil Procedure Code, seem to be inclined to the same view in

1. (1922) I.L.R. 44 A 622.
4. (1926) 24 L.W. 286.
5. (1915) 28 C.L.J. 4.
6. (1925) I.L.R. 47 A 770.
7. (1914) 27 M.L.J. 266.
8. (1915) 28 M.L.J. 326.

Gholam Mowlah v. *Ali Hafis.*[5] We are not sure whether the presence of both Sir John Wallis and Sir Lancelot Sanderson on the Board who decided the present case is without significance when their Lordships say that no relief can be granted against a third party in a suit under section 92. It may be open to argument hereafter whether their Lordships have not gone the length of holding that the alienee is not even a proper party to a suit under section 92 and that consequently not even a declaration can be granted against the purchaser in such a suit regarding the invalidity of the alienation by the trustee, thus affirming the view of Sir John Wallis, C.J., in *Raghavalu Chetty* v. *Pollati Sitamma*[7] and *Rangasami Naidu* v. *Chinnasami Aiyar*[8] referred to above.

GIRIMONI DASI *v.* TARINI CHARAN POREL, I.L.R. 55 Cal. 538.

In this case a division bench of the Calcutta High Court has held following two prior decisions of a single Judge of that Court in *Dekari Tea Company, Limited* v. *India General Steam Navigation Company, Limited*[9] and *Amarchand Chamaria* v. *Banwari Lal Rakshit*[10] that when an award is passed in an arbitration pending suit, but without any reference through Court, the award cannot be given effect to and passed into a decree of Court under Order 23, Rule 3 of the Civil Procedure Code. Shortly before this decision, a Full Bench of the Bombay High Court in *Chanbasappa* v. *Basavalingayya*[11] went into the question very fully and came to the contrary conclusion holding that the provisions of section 89 of the Civil Procedure Code expressly save the rule enacted in Order 23, Rule 3 and the award can, therefore, be given effect as an adjustment or compromise, even though it may not be assented to by parties subsequently. This decision of the Full Bench was given so shortly before the decision under notice, that it could not have been referred to by the learned Judges in the present case. Again the Bombay decision has been followed by a Full Bench of the Madras High Court in *Subbaraju* v. *Venkataramaraju.*[12] The result, therefore, is that there are Full Bench decisions in Bombay, Madras and Allahabad in *Chanbasappa* v. *Basavalingayya,*[11] *Subbaraju* v. *Venkataramaraju*[12] and *Gajendra Singh*

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5. (1915) 28 C.L.J. 4.
7. (1914) 27 M.L.J. 266.
8. (1915) 28 M.L.J. 326.
9. (1920) 25 C.W.N. 127.
10 (1921) I.L.R. 49 C. 608.
11. (1927) I.L.R. 51 B. 908 (F.B.).
12. (1928) 55 M.L.J. 429 (F.B.).

v. *Durga Kunwar*[13] to the effect that such an award can be given effect to under Order 23, Rule 3 of the Civil Procedure Code. It is not, therefore, unlikely, that when the question comes up again before the Calcutta High Court, it may adopt the conclusion arrived at by the Bombay Full Bench after an exhaustive consideration of the question. It may, however, be remarked that when an award is thus given effect to under Order 23, Rule 3, so long as there is no illegality in the award itself, there seem to be no machinery to question it on the ground of any misconduct of the arbitrator, his partiality or corruption in the course of the arbitration. This would seem to be the result of the observations of Crump, J., in *Chanbasappa* v. *Basavalingayya*,[11] that the word "lawful" in Order 23, Rule 3 has reference to the nature of the compromise arrived at and not to the procedure in arriving at the award. This is one of the difficulties pointed out by Rankin, C. J., in *Amarchand Chamaria* v. *Banwari Lal Rakshit*[10] in the way of giving effect to the award under Order 23, Rule 3 and it is not clear how this difficulty is to be got over.

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10. (1921) I.L.R. 49 C. 608
11. (1927) I.L.R. 51 B. 908 at 948 (F.B.).
13. (1925) I.L.R. 47 A. 637 (F.B).

GOPAL RAM *v.* MAGNI RAM, I.L.R. 7 Pat. 375 (F.B.):

We agree that the order of the District Judge appealed against was really one under S. 43 of Act V of 1920 and the leave of the court was necessary for an appeal against the same, such leave however may be given in proper cases even at the time of the final hearing. The Madras High Court also has taken a similar view in *W. Elliot, Official Receiver, Cuddapah* v. *Mopparapu Subbiah*[1] and *Ananthanarayana Aiyar* v. *Sankaranarayana Aiyar*[2]. There is also a good deal of force in the contention that the order of the High Court admitting the appeal and directing notice to the respondent was virtually one granting the required leave by necessary implication. The observation of the learned Judge that O. 41, R. 11 had no application to the case is however not intelligible, inasmuch as O. 43 makes the provisions of O. 41 applicable so far as may be, in the case of appeals against orders and S. 5 of the Insolvency Act attracts the procedure of the Civil Procedure Code. Apart from that, however, the principle of the ruling of the Privy Council in *Krishna Aiyangar* v. *Nallaperumal Pillai*[3] may well be relied on as justifying the decision on this point.

On the main point decided by the Full Bench, there is a divergence of opinion among the High Courts. While the Calcutta, Lahore and Patna Courts hold that an extension of time under S. 27, clause (2) of Act V of 1920 can be granted even after expiry of the period originally fixed and that, in such circumstances S. 43 of the Act does not compel the Court to annul the adjudication, the Madras High Court takes a contrary view. See *Tirumala Reddi Chinnappa Reddi* v. *Kolakula Thomasu Reddi*[4]. But even in Madras the decisions are not quite uniform. See *Arunagiri Mudaliar* v. *Kandaswami Mudaliar*[5] and *Manikkam Pattar* v. *Nanchappa Chettiar*[6]. We think the view of the Full Bench is the correct one. The discussion as to whether S. 43 is mandatory or directory is really beside the point. It may be granted that if the conditions required for the applicability of S. 43 are found to exist, the Court is bound to annul the adjudication and in this sense the words are mandatory. The real point, however, is whether the applicability of S. 43 cannot be excluded by the granting of

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1. (1927) I.L.R. 50 M. 815 : 53 M.L.J. 742. 2. (1923) I.L.R. 47 M. 673.
3. (1919) L.R. 47 I.A. 33 : I.L.R. 43 M. 550 : 38 M.L.J. 444 (P.C.).
4. (1927) 54 M.L.J. 344: 5. (1923) 19 L.W. 418.
6. (1928) M.W.N. 441.

further time under S. 27, clause (2) even on an application filed after the expiry of the period fixed under S. 27. There is nothing in the language of S. 27 to limit the power of the Court to grant an extension of time only to cases where the time fixed has not expired or where an application has been filed before the said period. The language is general and comprehensive enough to include cases of extension even after the expiry of the period fixed. S. 148 of the Civil Procedure Code and the inherent power of the Court recognised by the Privy Council in the case of *Badri Narain* v. *Sheo Koer*[7] are sufficient authority for the same. There is again nothing in the language of S. 43 of the Insolvency Act which makes the application of S. 148 of the Civil Procedure Code by reference to S. 5 of the Act inapplicable or inconsistent with the terms or objects of the Act. The assumption that an annulment of adjudication is in all cases a punishment of the defaulting insolvent is incorrect. Cases are conceivable where the annulment of the adjudication order is really of benefit to the insolvent and some of the creditors whom he might have fraudulently preferred and it may be that in those cases an annulment of adjudication may really operate to the detriment of the majority of creditors. The vesting of the properties of the insolvent under S. 37 in some third parties may not always be an adequate safeguard. An annulment may prevent the starting of proceedings under Ss. 53 and 54, to avoid fraudulent transfers and preferences by the insolvent. In view of the time limit fixed by the sections a fresh adjudication by the creditors may not give them the same advantages. While perhaps in the case of transfers in fraud of creditors, the creditors may take proceedings under S. 53 the hardship is undoubted in the case of fraudulent preferences as these can be avoided only under the Bankruptcy Laws and within the time limited. The decision of the Sindh Court in *Saligram* v. *Official Receiver*[8] is instructive on the point under discussion.

JIJIBHOY N. SURTY *v.* T. S. CHETTYAR FIRM, L. R. 55 I.A. 161 : I.L.R. 6 Rang. 302 : 54 M.L.J. 696 (P.C.).

This decision of the Privy Council sets at rest the conflict of views in the High Courts as regards the construction of S. 12 of the Limitation Act (IX of 1908). Their Lordships

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7. (1889) I.L.R. 17 C. 512 (P.C.).
8. (1925) 91 I.C. 467.

overrule the view that the time taken for obtaining copies of judgment and decree can be excluded only if the said documents are required to be filed along with the memorandum of appeal. Even if the rules of the Court do not require the said documents to be filed along with the memorandum of appeal, the time properly taken to obtain them must be excluded as S. 12 does not say why the time is excluded but simply enacts it as a positive direction. There may well be other reasons why the legislature provides for the exclusion of the said period. The authority of the decisions of the Madras High Court in *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*[1] and *Abu Backer Sahib* v. *Secretary of State*[2] in so far as they proceed on the construction of S. 12 is specifically rejected. The decision of the Full Bench in *Fazal Muhammad* v. *Phul Kual*[3] is explained away as not a decision under the Limitation Act. This will be correct only if it is understood that the period of limitation was not one fixed under the Limitation Act. The statement of their Lordships that the clause in the Letters Patent which conferred the right of appeal fixed its own period for the same is however inaccurate as the period for preferring the Letters Patent Appeal was regulated not by the Letters Patent itself but by the rules of practice of the High Court which provided that all such appeals should be preferred "within ninety days unless the Court in its discretion on good cause shown shall grant further time." No doubt it has been held that the period of time fixed by any special enactment which is a complete Code in itself cannot be affected by reference to the general provisions of the Limitation Act. An instance of this will be found in the decision of the Privy Council in *Muhammad Bahadur Khan* v. *The Collector of Bareilly*[4]. It is difficult to hold the case in *Fazal Muhammad* v. *Phul Kual*[3] came under the principle of the above ruling. It must, therefore, be now taken that the decision in the Allahabad Full Bench case is really erroneous, though their Lordships do not say so in so many terms but seem to exclude that case from their consideration as belonging to a different type altogether. The Madras High Court has, relying on the principle of the decision in *Muhammad Bahadur Khan* v. *The Collector of Bareilly*[4], held that the Indian Registration Act and the Madras Forest Act are special Acts complete in themselves and the general provisions of the Limitation Act do

1. (1897) I.L.R. 20 M. 476.
2. (1909) I.L.R. 34 M 505 : 20 M.L.J. 283 (F.B.).
3. (1879) I.L.R. 2 A. 192 (F.B.). 4. (1874) L.R. 1 I.A. 167.

not apply to proceedings thereunder. See *Veeramma* v. *Abbiah*[1] and *Abu Backer Sahib* v. *Secretary of State for India*[2]. Reference may also be made to *Srinivasa Aiyangar* v. *Secretary of State for India*[6] and to *Lingayya* v. *Chinna Narayana*[7] where similar questions arose with reference to the Madras Revenue Recovery Act, II of 1864 and to the Provincial Insolvency Act, III of 1907. The decision of their Lordships, however, does not deal with the question whether the general provisions of the Limitation Act can be applied to the case of proceedings under special enactments which are not complete codes and therefore self-contained. Their Lordships, however, point out in their judgment that S. 12 makes no reference to the Code of Civil Procedure or to any other Act. It is significant that the legislature has now altered the terms of S. 29 of the Limitation Act IX of 1908 by Act X of 1922. In view of this legislative modification, the decision in *Lingayya* v. *Chinna Narayana*[7] is no longer of authority. Apart from the true interpretation of S. 12 of the Limitation Act the matter is concluded by the express terms of S. 29, clause (2) of the Limitation Act as it now stands after the modification by Act X of 1922. There is, however, no reference to the same either in the judgment of the High Court or of the Privy Council. The argument seems to have proceeded upon the footing that assuming that S. 12 applies on its true construction it does not apply to cases where the two documents referred to are not required for being filed along with the memorandum of appeal and that the time taken for obtaining them is not "requisite" within the meaning of the section. It is this contention which is rejected by the Privy Council. It may also be noted that the rules framed by the Rangoon High Court in respect of appeals against decrees passed in exercise of its original jurisdiction dispense with production of the certified copy of the decree only and that ordinarily a certified copy of the judgment should be filed along with the memorandum of appeal unless there is a special order dispensing with that also. It would therefore seem to follow that the time taken for obtaining a copy of the judgment should in any event have been excluded but the point is immaterial as on the true view of S. 12, even the time requisite for obtaining a copy of the decree as well should be excluded.

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2. (1909) I.L.R. 34 M 505 . 20 M.L.J. 283 (F.B.).
5. (1894) I.L.R. 18 M. 99 (F.B.).
6. (1912) I.L.R. 38 M. 92 · 24 M.L.J. 41.
7. (1917) I.L.R. 41 M. 169 : 33 M.L.J. 566 (F.B.).

PEARE MOHAN PRASAD *v.* RAGHUNATH LAL, I.L.R. 50 All. 259.

The Allahabad High Court cannot reconcile itself to a decree-holder not *certifying* payment before the time for execution expires, being allowed to use the payment by certifying the payment in the application for execution. There is no rule of limitation prescribing a time within which certifying by the decree-holder should take place. The prohibition as to evidence of payment is only in the absence of a certificate. The earlier Allahabad cases make the mistake of thinking that recording is essential before payments can be recognised in execution. Even so, the earlier Allahabad cases would not prohibit certifying after the execution is barred that is apart from the payment—all that they insisted upon was that the certifying must precede the application for execution. That is a mere technicality for it can be easily avoided by putting in a certificate first and the execution application next on the same day. These weak points in the argument of the Allahabad High Court are noticed by Mr. Justice Mukherjee who inclines to the view of the other High Courts. Mr. Justice Ashworth suggests a new justification for the Allahabad view. He thinks that the effect of the provision that the executing Court cannot recognise uncertified payment is that the execution Court must compute limitation from the date not of payment but of certification. To recognise a payment not certified before the decree became barred would be, in effect, according to him giving recognition to uncertified payment. This is tantamount to adding a new clause of limitation by analogy or implication which is certainly not permissible for the Courts to do.

JAISTH MADHO *v.* THAKUR SRI GAT, I.L.R. 50 All. 265.

This is a curious application we should rather think misapplication of *Vidya Varudhi* v. *Balusami Aiyar.*[1] No doubt that case is authority for saying that the property of the temple or mutt dedicated for the general purposes of the mutt or temple does not *vest* in the Matadhipathi or Manager so as to attract the application of Art. 134 or section 10 of the Limitation Act. But that is hardly a justification for holding that the amounts received by the manager whose position is recognised to be fiduciary and coming within the scope of section 92 of the Civil Procedure Act should be governed by

1. (1921) I.L.R. 44 M. 831: 41 M.L.J. 346 (P.C.).

Art. 62 of the Limitation Act. The appropriate article we should think in such a case would be Art. 120—the cause of action accruing from the date of the termination of the managership or if the managership is continuing, when there has been a demand and refusal. (*Yerukola* v. *Yerukola*.[2]) He being the manager of the institution, his receipt was rightful and his possession also was rightful. No sort of cause of action against him arose on the receipt by him except the right to have it accounted for when demand was made on behalf of the deity by some person duly authorised in that behalf. If his position is not that of a trustee, it was that of an agent to whose case Art. 85 would be the appropriate article applicable.

ISHRI PRASAD *v.* SRI RAM, I.L.R. 50 All. 270.

This case is one just on the line and necessarily one involving a lot of difficulty. A foreign judgment given on default without taking evidence is one not given on the merits within the meaning of Section 13, Civil Procedure Code. Is a judgment not given on evidence but purporting to be on the merits—would that be one on the merits? So far as that section is concerned, it is not what the Court purports to do that is material but what it has done seeing that no evidence of any sort was taken. The conclusion being one based upon the fact that the document was registered and that the defendant did not appear though served, it is rather difficult to say that the judgment is one rendered on the merits. If a judgment given *ex parte* in the absence of the defendant though on evidence, could be so regarded is itself not a settled point. (See *Mahomed Kassim & Co.* v. *Seeni Pakir Bin Ahmed*[3].)

EQUITABLE TRUST COMPANY *v.* HAFIZ MUHAMMAD, I.L.R. 50 All. 276.

On the question as to whether interlocutory order such as refusing to add parties would come within Section 115, Civil Procedure Code, there is a sharp difference of opinion between the various High Courts, on the one side the Calcutta, Bombay, Patna, Madras and Rangoon High Courts, on the other the Allahabad and Lahore High Courts. *Umed Lal* v. *Chand Mal*[4]

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2. (1922) I.L.R. 45 M. 648: 42 M.L.J. 507 (F.B.).
3. (1925) I.L.R. 50 M. 261: 52 M.L.J. 240 (F.B.).
4. (1926) I.L.R. 54 C. 338: 52 M.L.J. 368 (P.C.).

referred to and distinguished in this case is clear authority for the position that a question as to addition of parties might involve a question of material irregularity or jurisdiction so as to bring the case within section 115, Civil Procedure Code. But it is equally true as pointed out in this case that the question at issue in this case, *viz.*, as to whether the order refusing to make a person a party could be revised did not arise in that case as the revision was against the decree in a case in which no appeal lay on the ground that deciding the suit in the absence of the parties interested vitiated the judgment, the judgment was reversed and the suit was dismissed and this order was upheld by the Privy Council.

DORAISAMI GURUKAL *v.* SUBRAMANYA GURUKAL, I.L.R. 51 Mad. 266: 54 M.L.J. 361.

Rent means whatever lawfully payable in money or in kind or both to a landholder for the use or occupation of land in his estate for the purpose of agriculture and includes whatever is payable on account of water supplied or taken—S. 3, clause (11). Clause (15) contemplates a rent legally due on land. No doubt rent may not be enhanced except as provided in the Act but any question of enhancement would arise only if there is a legal lower rate.

Section 28 raises a presumption that the rate being paid is the lawful rate but is rebuttable. The rate paid may be less than the proper rate under section 25 for any of the reasons referred to in section 26. A return to the original rate in cases permissible under section 26 would not be an enhancement prohibited by the Act. Or again, the rate might be all right but the area might be wrongly given. In such a case, charging rent for the area left out is not considered enhancement by the Act, so that it is perfectly clear that all raising of the previously paid rent is not enhancement but only raising the lawfully payable rent is such. Accordingly if there is no definite rent on the land irrespective of the crops raised but only a crop war rent then a variation of the rent according to the crop though in fact the rent charged is higher rent than that previously charged is not enhanced rent. Viewed from that point of view, charging for water taken to which the tenant is not entitled does not constitute an enhancement. It is a charge for something to which he is not entitled according to the terms of the lease but which he has taken and for which he is bound

to pay. It would not come within clause (30). As Mr. Justice Ramesam observes the landlord would be remediless if the view put forward by Mr. Justice Curgenven which appealed to Mr. Justice Jackson was accepted. It is not an altogether irrelevant circumstance but we think the sections referred to by us do justify the construction put by the majority on the Act.

SUBBARAJU *v.* VENKATARAMARAJU, I.L.R. 51 Mad. 800: 55 M.L.J. 429 (F.B.).

The Madras High Court has been uniformly holding that an award on a reference pending suit without the intervention of the Court may be made a decree of Court under Order 23, Rule 3. The various provisions of the Civil Procedure Code under which defects in the award can be remedied would not obviously be available in such a case. As to what are the limitations subject to which the award can be made into a decree of Court, there is no authoritative decision. Misconduct of the arbitrators, there is no doubt, would be an invalidating circumstance but whether not all interested persons being parties to the reference, or matters outside suit or persons not parties being included in the reference, are objections available, there is no authority but observations in *Nanjappa* v. *Nanjappa Rao*[1] would seem to point to the contrary. That the same document should lead to a decree if application is made under one section and not, if made under another would undoubtedly seem to be an anomaly and it is also difficult to understand the object of enacting section 89 but notwithstanding the provisions of the code relating to the filing of awards passed without the intervention of the Court, there is nothing to prevent parties suing upon awards or of pleading awards in defence to actions and so long as that can be done, it can be no great objection that a particular species of them passed during suits should similarly afford grounds of defence.

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1. (1912) 23 M. L.J. 290.

KAMALA PROSAD SUKUL *v.* KISHORI MOHAN PRAMANIK, I.L.R. 55 Cal. 666.

This decision deals with the liability of joint tort-feasors and the effect on the maintainability of an appeal by reason of the non-joinder in the appeal of some of the joint tort-feasors against whom a judgment was obtained in the lower Court. The learned Judges have held that in such a case, the appeal would not be maintainable and could not proceed to judgment on the merits.

It is well-settled law that the liability of joint tort-feasors is joint and several in its nature. We venture to think all that the learned Judges mean when they say that this is not an inflexible rule is that when they are not joint tort-feasors in the strict sense of the term as when by their independent action and without a common design an injury is caused to a third person, then the rule has no application and there is in reality in such cases only separate torts and not a joint tort and consequently there is only a several liability. This aspect of the question was clearly discussed by the Court of Appeal in *The Koursk*[1] where by the independent negligent acts of two steamers a third steamer was injured and it was held that those two were not joint tort-feasors and a judgment obtained against one of them would not bar an action against the other.

Coming to the case of joint tort-feasors, the learned Judges have held, following the leading case of *Brinsmead* v. *Harrison*[2] and the other English cases, that a judgment obtained against any one of them is, even in the absence of satisfaction, a bar to an action on the tort against the others. This rule seems to have been rested in England more on *stare decisis* than on any clear intelligible principle. Indeed Montague Smith, J., in *Brinsmead* v. *Harrison*[3] says that if the matter were *res integra*, he would be inclined to take the opposite view that until satisfaction a judgment against one joint tort-feasor would not bar an action against another. This seems to be the rule in the United States where the same system of law is administered. Willes, J., in the same case puts it as a rule of procedure which, if it were only such, would not apply to this country. In the same case Kelly, C.B., would base it on a principle of *transit in rem judicatam;* but it is not easy to realise the force of it in the case of a joint and several liability, whatever may be its force in the case of joint liability. In this connection we would draw attention to

1. (1924) P. 140. 2. (1872) L. R. 7 C. P. 547.
3. (1871) L. R. 6 C. P. 584.

the observations on the principle of *transit in rem judicatam*, by Lord Penzance in *Kendall* v. *Hamilton*[4], even with reference to joint liability.

In the case of contracts where there is a joint and several liability, it has been the accepted law, that a judgment against one of the joint contractors without satisfaction would not bar an action against the others, *King* v. *Hoare*[5]. The rule of *transit in rem judicatam* does not therefore really seem to affect the question. The decision in *Brown* v. *Wootton*[6] would put it that in the case of joint tort-feasors, an uncertain liability is made certain by the judgment against one of the joint tort-feasors and that this distinguishes it from the case of a joint and several contract where the damages are certain. This distinction does not seem to proceed on any legal principle. It therefore remains that the decision in *Brinsmead* v. *Harrison*[2] rests on *stare decisis* from the case of *Brown* v. *Wootton*[6]. It is interesting to note that Bankes, L. J., in *The Koursk*[1] did not apparently feel satisfied about the variety of reasons given for the rule in *Brinsmead* v. *Harrison*[2]. As for the rule of convenience, at least as much can be said against the rule laid down in the case, as in its favour. It may therefore be that when the matter comes to be examined on principle in this country the Courts may consider whether the English rule has to be adopted or the rule adopted in America, and which has been applied even in England in the case of joint and several liability in the case of contracts.

Again, the decision of the question has not been rested in the English Cases, on any view of the right of contribution as between the joint tort-feasors and it may well be presumed that the one has no necessary connection with the other, as can be seen from the case of joint and several contractors in which case, there is a right of contribution but still a judgment against one is not a bar to a suit against the others.

It remains to notice, that the observations of the learned Judges at page 672, that the rule in *King* v. *Hoare*[5], has been held applicable to the case of joint debtors in this country are by no means clear. The weight of authority in this country, as we understand it, is that, by reason of the enactment of S. 43 of the Indian Contract Act, all joint promises are, in the absence of a contract to the contrary, joint and several in their nature. That this is the effect of section 43 is

1. (1924) P 140. 2. (1872) L R 7 C. P. 547.
4. (1879) 4 A.C. 504 at 525-529. 5. (1845) 13 M. & W. 494.
6. (1605) Cro. Jac. 73 : 79 E. R. 62.

the opinion of Sir Frederick Pollock, in his commentaries on the Indian Contract Act and the same was laid down in *Muhammad Askari* v. *Radha Ram Singh*[7] after a careful examination of the authorities. This decision has been generally followed by the other High Courts. See *Ramanjulu Naidu* v. *Aravamudu Aiyangar*[8], *Mool Chand* v. *Alwar Chetty*[9], *Motilal Bechardass* v. *Chellabhar Hariram*[10], *Raghunath Dass* v. *Baleswar Prasad Chaudhuri*[11] and *Krishna Dass Roy* v. *Kali Tara Chowdhurani*[12]. In this view, the rule in *King* v. *Hoare*[5] which is based on a joint liability under a contract and not a joint and several liability has no application in this country. Baron Parke in *King* v. *Hoare*[5] pointed out that in the case of a joint and several liability under a contract, a judgment without satisfaction against one of the debtors would not bar another action on the contract against the others. The observations of the learned Judges would thus not seem to represent the result of the decisions on this question, although there is no direct decision of the Privy Council on the matter and some recent decisions of the Bombay High Court have taken a different view of section 43 of the Contract Act.

KISHAN SINGH *v.* THE KING-EMPEROR, I.L.R. 50 All. 722 : 55 M.L.J. 786 (P.C.).

The question in this case was whether on an application for revision by the Government, the High Court can alter a conviction on culpable homicide into one for murder when on the latter charge he had been acquitted and there is no appeal so far as that conviction is concerned. Their Lordships hold that it cannot. Section 439, Cl. (14) is perfectly clear that the High Court cannot convert, while acting under that section, a finding of acquittal into one of conviction. But the High Court of Madras in *Re Bali Reddi*[13] held that that clause only applies when there has been a complete acquittal and not when there is merely an acquittal on one of the charges. Their Lordships dissent from this view. Their Lordships do not however express an opinion on the question whether in the circumstances of that case, the decision was right. In that case there was an acquittal on the charge of murder and a conviction on a charge of rioting and the accused

5. (1845) 13 M. & W. 494.
7. (1900) I.L.R. 22 A. 307.
8. (1909) I.L.R. 33 M. 317.
9. (1915) I.L.R. 39 M. 548.
10. (1892) I.L.R. 17 B. 6.
11. (1927) I.L.R. 7 Pat. 353.
12. (1917) 22 C.W.N. 289.
13. (1913) I.L.R. 37 M. 119.

had appealed against the conviction and the High Court had given notice of enhancement. On the appeal their Lordships altered the conviction into one of murder and purported to enhance the sentence under S. 439, that is to say, they did not purport to alter the acquittal into one of conviction on the revision but only enhanced the sentence under that section. As to the legality of this course, their Lordships express no opinion.

QUADRI JAHAN BEGAM *v.* FAZAL AHMAD, I.L.R. 50 All. 748.

The Allahabad High Court held under the old Code that when a compromise is brought to the notice of the Court by one party but is denied by the other, it is not bound to investigate the question. The Legislature has overruled that view. In this decision, it holds that the Court cannot inquire under O. 23, R. 3, into the question whether the compromise is vitiated by fraud—in its view, the use of the word "lawful" makes it clear that only the question of legality of the compromise can be considered. We think that this is a wholly gratuitous assumption and is to be deprecated as it imputes to the Legislature an intention to multiply proceedings for no conceivable reason. The language of section 23 of the Contract Act is different and we do not quite see why a compromise vitiated by fraud or unsupported by consideration should be regarded as a *lawful* compromise.

[END OF VOLUME LV.]